PB90-780115

Enforcement Project Management Handbook

Booz-Allen and Hamilton, Inc., Bethesda, MD

Prepared for:

Environmental Protection Agency, Washington, DC

Jul 89

U.S. Department of Commerce
National Technical Information Service
NTIS

PB90-780115

ENFORCEMENT PROJECT MANAGEMENT HANDBOOK

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

JULY 89

U.S. DEPARTMENT OF COMMERCE
National Technical Information Service
NTIS

[illegible]

United States
Environmental Protection
Agency

Solid Waste
and Emergency Response
(WH-527)

Directive 9837.2
July 1989

EPA

Enforcement Project Management Handbook

REPRODUCED BY
U.S. DEPARTMENT OF COMMERCE
NATIONAL TECHNICAL INFORMATION SERVICE
SPRINGFIELD, VA. 22161

TECHNICAL REPORT DATA

(Please read Instructions on the reverse before completing)

1. REPORT NO. OSWER Directive 9837.2	2.	3. RECIPIENT'S ACCESSION NO.
4. TITLE AND SUBTITLE Enforcement Project Management Handbook		5. REPORT DATE July 10, 1989 (Date Issued)
		6. PERFORMING ORGANIZATION CODE
7. AUTHOR(S)		8. PERFORMING ORGANIZATION REPORT NO.
9. PERFORMING ORGANIZATION NAME AND ADDRESS Booz, Allen & Hamilton Inc. 4330 East West Highway, Suite 800N Bethesda, MD 20814		10. PROGRAM ELEMENT NO.
		11. CONTRACT/GRANT NO. 68-01-7331
12. SPONSORING AGENCY NAME AND ADDRESS U.S. Environmental Protection Agency OSWER/OWPE/CED 401 M St. SW Washington, DC 20460		13. TYPE OF REPORT AND PERIOD COVERED Final
		14. SPONSORING AGENCY CODE

15. SUPPLEMENTARY NOTES

16. ABSTRACT

This publication is a basic reference and training manual to assist EPA Superfund field personnel (Remedial Project Managers and On Scene Coordinators) in planning, negotiating and managing potentially responsible party (PRP) searches and PRP-lead actions at Superfund sites. It provides an overview of each phase of the Superfund enforcement process and discusses specific roles and responsibilities of the RPM/OSC in the process.

17. KEY WORDS AND DOCUMENT ANALYSIS

a. DESCRIPTORS	b. IDENTIFIERS/OPEN ENDED TERMS	c. COSATI Field/Group
Hazardous Waste Management/Superfund		

18. DISTRIBUTION STATEMENT	19. SECURITY CLASS *(This Report)*	21. NO. OF PAGES 508
	20. SECURITY CLASS *(This page)*	22. PRICE

EPA Form 2220-1 (Rev. 4-77) PREVIOUS EDITION IS OBSOLETE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 10 1989

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Transmittal of Enforcement Project Management Handbook

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

TO: Distribution

The purpose of this memorandum is to transmit the final version of the Enforcement Project Management Handbook to Headquarters and Regional offices.

This Handbook has been prepared as a basic reference and training manual to assist Remedial Project Managers (RPMs) and On-Scene Coordinators (OSCs) in planning, negotiating and managing potential responsible party (PRP) searches and PRP-lead actions. It is intended to provide an overview of each phase of the enforcement process and to discuss specific roles and responsibilities of the RPM/OSC in the process.

Procedures and information contained in this document are based on existing and draft EPA policy and guidance. Specific documents are referenced as sources of additional information on particular topics.

For additional information on the Handbook or to obtain extra copies, contact the training specialist in the Compliance Branch of CERCLA Enforcement Division at FTS 382-4819.

Attachment

DISCLAIMER

The policies and procedures established in this document are intended solely for the guidance of employees of the U.S. Environmental Protection Agency. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. EPA reserves the right to act at variance with these policies and procedures and to change them at any time without public notice.

ACKNOWLEDGEMENTS

This document was prepared by the Compliance Branch of CERCLA Enforcement Division in EPA's Office of Waste Programs Enforcement. Debby Thomas served as EPA's Project Coordinator. The project was directed by Lloyd Guerci, Director CERCLA Enforcement Division, with the assistance of Mike Kilpatrick and Frank Russo, Compliance Branch Chiefs.

The following people also provided significant input in the development or review of specific chapters:

EPA Headquarters

Frank Biros, Nellie Boone, Linda Boornazian, Patty Bubar, Susan Cange, Carrie Capuco, Walter DeRieux, Dan Dickson, Tony Diecidue, Bill Eckroade, Donna Gerst, Bruce Gruenwald, Ed Hanlon, Johanna Hunter, Lee Jennings, Sven-Eric Kaiser, Randy Kaltreider, Julie Klaas, Emil Knutti, Jerry Lappan, Debbie Lebow, Marlene Lemro, Rashalee Levin, Charles Openchowski, Dottie Pipkin, Rick Popino, Doug Sarno, Betsy Shaw, Sherry Sterling, Steve Suprin, Debbie Swichkow, Candace Wingfield, Jim Woolford, Brad Wright and Betty Zeller.

EPA Regional Offices

Mike Bishop, Robin Coursen, Jody Crane, David Duster, D. Henry Elsen, Elizabeth Evans, Eric Finke, Barbara Hanson, Stan Hitt, Rick Karl, Lynn Kersher, Sharon Kersher, Kathy Land, Barry Levine, Carole Macy, Sam Marquery, Sharon Metcalf, Elizabeth Mullin, Doug Mundrick, Carole Peterson, Greg Phoebe, Peter Shaw, Kathleen Siftar, Alexis Strauss, Ann Umphres, Sam Vance, Ann Vogel, Ken Wallace, and Carrie Wehling.

In addition, Region I staff, notably Ira Leighton, Dennis Hubner and Susan Siversky, produced a two-volume manual entitled Enforcement and Remedial Activities under SARA which was used as a model for several sections of this handbook.

Department of Justice (DOJ)

Anna Swerdel coordinated the review and comment process at DOJ.

The handbook was produced by Booz, Allen and Hamilton Inc. under EPA contract No. 68-01-7331. Anne Nelson served as Project Manager for Booz, Allen and Hamilton Inc.

ENFORCEMENT PROJECT MANAGEMENT HANDBOOK

Table of Contents

Acronyms List

i. Preface

I. Introduction

II. Removals

III. Comprehensive Site Planning

IV. PRP Search, Notification, and Information Exchange

V. RI/FS Negotiations/Settlement

VI. RI/FS Implementation

VII. Selection of Remedy

VIII. RD/RA Negotiations/Settlement

IX. RD/RA Implementation

X. Operation and Maintenance

XI. Site Completion/Deletion

XII. Cost Recovery

XIII. Community Relations

XIV. State Enforcement

XV. Records Management

XVI. Case Budget/Contracts

XVII. SCAP/SPMS Cycle

Index

ACRONYMS

AA, OSWER	Assistant Administrator for Solid Waste and Emergency Response
AAG	Assistant Attorney General
AO	Administrative Order
AOA	Advice of Allowance
AOC	Administrative Order on Consent
AOU	Unilateral Administrative Orders
ARARs	Applicable or Relevant and Appropriate Requirements
ARCS	Alternative Remedial Contracts Strategy
ATSDR	Agency for Toxic Substances and Disease Registry
BODR	Basis of Design Report
CA	Cooperative Agreement
CB	Case Budget
CD	Consent Decree
CEAT	Contract Evidence Audit Team
CERCLIS	Comprehensive Environmental Response, Compensation, and Liability Information System
CI	Civil Investigator
CLP	Contract Laboratory Program
CPM	Critical Path Method
CRC	Community Relations Coordinator
CRC	Cost Recovery Coordinator
CRI	Community Relations Implementation
CRP	Community Relations Plan

CWA	Clean Water Act
DOI	Department of the Interior
DOJ	Department of Justice
DQO	Data Quality Objective
EA	Endangerment Assessment
EE/CA	Engineering Evaluation/Cost Analysis
EERU	Environmental Emergency Response Unit
EMSL	Environmental Monitoring and Systems Laboratory
EPIC	Environmental Photographic and Investigation Center
EPM	Enforcement Project Manager
ERNS	Emergency Response Notification System
ERS	Environmental Response Services
ESD	Environmental Services Division
	Explanation of Significant Difference
FIT	Field Investigation Team
FMD	Financial Management Division
FMO	Financial Managment Office
FMS	Financial Management System
FR	*Federal Register*
FSP	Field Sampling Plan
FTE	Full-Time Equivalent
GFO	Good Faith Offer
GNL	General Notice Letter
HQ-FMO	Headquarters - Financial Management Office
HRS	Hazard Ranking System

HSCD - Hazardous Site Control Division

IAG - Inter-Agency Agreement

IDC - Indirect Cost

IMC - Information Management Coordinator

LOE - Level of Effort

LTRA - Long-Term Response Action

NBAR - Non-Binding Preliminary Allocations of Responsibility

NCP - National Contingency Plan

NEIC - National Enforcement Investigation Center

NOAA - National Oceanic and Atmospheric Administration

NPB - OECM National Project Branch

NPL - National Priorities List

NRC - National Response Center

NSD - Negotiation Support Document

O&M - Operation and Maintenance

OECM - Office of Enforcement and Compliance Monitoring

OERR - Office of Emergency and Remedial Response

OGC - Office of General Counsel

OIRM - Office of Information Resource Management

OMB - Office of Management and Budget

OMSE - Office of Management Systems and Evaluation

ORC - Office of Regional Counsel

OSC - On-Scene Coordinator

OU - Operable Units

OWPE - Office of Waste Programs Enforcement

PDD - Preauthorization Decision Document

PNRS - Preliminary Natural Resource Surveys

PRAP - Proposed Remedial Action Plan

PRP - Pontentially Responsible Parties

QA/QC - Quality Assurance/Quality Control

QAPP - Quality Assurance Project Plan

QAPP/FSP - Quality Assurance Project Plan/Field Sampling Plan

RA - Remedial Action

RCRA - Resource Conservation and Recovery Act

RD - Remedial Design

RI/FS - Remedial Investigation/Feasibility Study

ROD - Record of Decision

RP - Responsible Party

RRT - Regional Response Team

SAIC - Special-Agent-In-Charge

SAP - Sampling and Analysis Plan

SARA - Superfund Amendments and Reauthorization Act

SCAP - Superfund Comprehensive Accomplishments Plan

SDC - Settlement Decision Committee

SE - State Enforcement

SETS - Superfund Enforcement Tracking System

SIF - Site Information Forms

SMOA - Superfund Memorandum of Agreement

SMP - Site Management Plan

SNL - Special Notice Letter

SOW - Statement of Work

SPMS - Strategic Planning and Management System

SPO - State Project Officer

SPUR - Software Package for Unique Reports

TAG - Technical Assistance Grant

TAT - Technical Assistance Team

TBC - To-Be-Considered Material

TBD - To Be Determined

TDD - Technical Directive Document

TDD-AOC - Technical Directive Document - Acknowledgement of Completion

TES - Technical Enforcement Support

TESWATS - Technical Enforcement Suppport Work Assignment Tracking System

TSC - Transportation Systems Center

TSCA - Toxic Substances Control Act

USCG - United States Coast Guard

WAM - Work Assignment Manager

PREFACE

Overview

This handbook has been prepared primarily to assist EPA Remedial Project Managers (RPMs) in planning, negotiating, and managing PRP-lead actions. However, other field personnel such as On-Scene Coordinators (OSCs) may also find the handbook useful for their purposes. It describes the roles and responsibilities of the RPM in identifying and communicating with Potentially Responsible Parties (PRPs); coordinating with the community, States, and natural resource trustees; negotiating for site cleanup; initiating administrative and judicial enforcement actions; selecting site remedies; recovering EPA's cleanup costs; and overseeing PRP-lead response actions. The description of roles and responsibilities is based on the usual progression of events at an average site. The handbook is also meant to complement EPA's Superfund Federal-Lead Remedial Project Management Handbook and Superfund State-Lead Remedial Project Management Handbook by serving as a reference guide on enforcement actions that may be taken or considered during each step of the removal and remedial processes.

Policies and Guidance

Procedures and information contained in this document are based on existing, draft, and, in some cases, proposed EPA policy and guidance. The handbook, however, is not intended to replace Agency guidance, nor is it intended to stand alone. Instead, the chapters that follow summarize in a single document information concerning EPA's national enforcement program and the role of RPMs in that program. The reader should bear in mind that to keep this document to a moderate length, some oversimplification was necessary. Throughout the handbook, the reader is referred to specific, detailed policies and procedures. As appropriate, the reader should use these references to supplement the information presented in this handbook.

Role of RPMs

The emphasis of this handbook is on the role of the RPM in the enforcement process. It is recognized, however, that Regional differences exist in defining that role. For example, in many Regions, cost recovery activities are handled by staff without remedial project management responsibilities. Therefore, when the term "RPM" is used in this handbook in connection with specific activities, the reader should bear in mind that these activities are ones for which the RPM may be responsible. RPMs should consult with Regional managment on the scope of their specific responsibilities.

Structure

The handbook addresses the removal enforcement process and the phases of the remedial planning and implementation process from the point of the baseline PRP search, which is generally conducted when the site is listed on the NPL, to the point of completion of remedial activity at a site and the site's deletion from the NPL. The handbook has been organized to follow the overall progression of these phases.

In addition to chapters that discuss the various phases of the remedial process, the handbook includes eight additional chapters and an introduction.

The additional chapters present enforcement topics that either are not a part of the remedial process or are relevant to many steps in the process. These chapters cover enforcement activities associated with cost recovery, community relations, State enforcement, records management, case budget and contracts, and the SCAP/SPMS cycle and CERCLIS.

Format

The chapters are organized to provide a description of the phase of site cleanup or specific enforcement activity; a chronology of procedures for which the RPM has responsibility; associated planning and reporting requirements; a discussion of potential problems and possible resolutions; and a reference section, which lists titles of relevant policies and guidance documents, and contacts for further information. This organization of information facilitates a pro-active management style of anticipating and resolving problems before they adversely impact project costs, schedules, or technical quality.

Applicability

While the handbook is designed for both new RPMs and RPMs who have experience with the enforcement program, it is hoped that it will also help clarify for other EPA personnel the many technical, enforcement, and management tasks required to complete a PRP-lead site. This handbook is for internal EPA use only. It does not create rights in any party and may not be quoted as an authoritative source by any PRP.

INTRODUCTION

This introduction provides a broad overview of the Superfund enforcement program. The chapter is divided into four major sections:

- Goals
- Background
- Overview
- Players

Each of these is presented below.

I. GOALS OF THE ENFORCEMENT PROGRAM

The overall goal of the Superfund program is to protect human health and the environment through timely and effective site remediation at the maximum number of sites. Enforcement plays a major role in the process.

Obtaining PRP Response

A primary goal of the enforcement program is to obtain voluntary settlement, or if necessary, to compel Potentially Responsible Parties (PRPs) to implement site cleanups. The primary tools used to meet this goal are the administrative order and judicial enforcement authorities of section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the settlement provisions of section 122. These authorities are discussed in more detail in Chapter V, RI/FS Negotiations and Chapter VIII, RD/RA Negotiations.

Overseeing PRP Response

Once the PRP has agreed to take response actions at a site, the goal of the enforcement program is to ensure that the studies or cleanup activities are performed correctly and in accordance with the order or decree, and the statute, NCP and relevant guidance. In addition to their oversight, Remedial Project Managers (RPMs) use the authority in section 104 of CERCLA for third party oversight of PRP-conducted RI/FS activities to ensure that this goal is met. Oversight responsibilities are discussed in Chapter II, Removals; Chapter VI, RI/FS Implementation; and Chapter IX, RD/RA Implementation.

Recovering EPA's Costs

In situations where EPA has performed removal or remedial activities at the site or incurred any enforcement costs, the enforcement program's goal is to recover those costs from the PRPs. Cost recovery actions are essential both to replenish the Fund and to deter other PRPs from trying to avoid responsibility for performing response actions themselves. The authority for recovering costs is provided by section 107 of CERCLA. Cost recovery is discussed further in Chapter XII, Cost Recovery.

II. PROGRAMMATIC BACKGROUND

CERCLA gives EPA a broad set of tools with which to clean up hazardous waste sites. These include a variety of enforcement tools, such as administrative order authority, judicial enforcement authority, strong liability provisions, and the authority and funding to take direct action to clean up sites.

Liability

Section 107 of CERCLA outlines the basic liability provisions of the enforcement program. It identifies four classes of PRPs:

- Current facility owners and operators
- Past facility owners and operators at the time of disposal of a hazardous substance
- Persons who arranged for treatment or disposal of hazardous substances (e.g., generators)
- Transporters of hazardous substances who selected the disposal site.

CERCLA is a strict liability statute, which means that PRPs are liable without regard to negligence or fault. In addition, the courts have held that anyone in the classes of liable persons set forth in section 107 of CERCLA may be held liable for the entire cost of site cleanup, unless it can be shown that the harm or threat is "divisible" (generally meaning that there are two or more physically separate areas of contamination). This concept, known as "joint and several liability," is a strong tool that EPA can use to encourage PRPs to agree to perform cleanups. It is discussed in more detail in Chapter IV, PRP Search, Notification, and Information Exchange, and Chapter XII, Cost Recovery.

Settlement and Enforcement Provisions

CERCLA provides a broad range of enforcement authorities or provisions that EPA can use to effectively meet the goals of the Superfund program. These include authorities to order PRPs to clean up sites, to negotiate settlements with PRPs to fund and/or perform site cleanup, and to take legal action if the PRPs do not perform and/or pay for cleanup.

Settlements for removals are usually finalized by administrative orders on consent (consent orders). Similarly, settlements for RI/FS are generally by consent orders. Settlements for RD/RA are more complex and are set forth in consent decrees that must be approved by the Department of Justice and a court.

Under CERCLA, EPA may use a variety of special settlement tools. In mixed funding settlements, settling PRPs and EPA contribute to the response action and EPA generally pursues viable non-settlors for the costs EPA incurred. In de minimis settlements, EPA may settle with relatively minor contributors when the settlement involves only a minor portion of the response costs and when the amount of waste represents a relatively minor amount and is not highly toxic compared to other substances at the facility. Additionally, EPA is authorized to utilize preliminary Non-binding Allocations of Responsibility (NBARs) to promote settlement. NBARs represent a recommended scheme for allocating costs among the PRPs for settlement purposes only, are not binding, and cannot be admitted as evidence in court. These settlement tools are discussed fully in Chapter V, RI/FS Negotiations and Chapter VIII, RD/RA Negotiations.

Enforcement Authority

If the PRPs do not settle with EPA, section 106 of CERCLA gives the Agency the authority to unilaterally order the PRPs to conduct the response. In addition, with the assistance of the Department of Justice, EPA may sue the PRPs for a court order under section 106 that requires the PRPs to perform the cleanup. Under section 107, EPA may sue PRPs for cost recovery. These authorities are discussed further in Chapter VIII, RD/RA Negotiations, and Chapter XII, Cost Recovery.

Other Statutes

In addition to the authorities provided by CERCLA, the Agency may, in some instances, use authorities provided by other environmental laws (although the applicability of each of these other laws is subject to specific legal requirements which are beyond the scope of this handbook). For example, under the Resource Conservation and Recovery Act (RCRA), the Agency can order owners and operators of operating and closing hazardous waste facilities to investigate any potential leaks and to clean up the facility if necessary. The Toxic Substances Control Act (TSCA) and its regulations can be used by the Agency to impose conditions on the handling of particularly hazardous substances, such as asbestos and PCBs. In addition, in some cases where releases affect surface waters, the provisions of the Clean Water Act (CWA) can be used to impose fines and require cleanup. These other statutes also provide the basis for many of the applicable and relevant and appropriate standards (ARARs) on which cleanup levels are based in site records of decision. ARARs are also mentioned in Chapter VII, Selection of Remedy.

Programmatic Goals

SARA added statutory deadlines for the initiation of response activities. These deadlines include:

- 275 new RI/FS starts by October 17, 1989, and if this deadline is not met, then also:
- 175 new RA starts by October 17, 1989 and
- 200 additional RA starts by October 17, 1991.

Because funding for EPA cleanups is limited, the Agency cannot meet these statutory goals with Fund-lead cleanups alone. Thus, the enforcement program must ensure that PRPs commit to perform cleanups at a substantial portion of sites. If planned properly, negotiated settlements do not take longer to implement than Fund-lead activity; the key elements are good planning and effective deadline management.

The enforcement authorities provided by CERCLA offer a strong incentive to PRPs to settle with EPA. Settlement may be a faster and less-costly alternative to litigation, and can alleviate the risk to the PRPs of becoming involved in costly litigation or being assessed treble damages.

III. OVERVIEW OF THE PROCESS

The Superfund program involves an integrated process of both enforcement and Fund-financed activities aimed at achieving the overall goal of site cleanup. Exhibit I-1 presents a broad overview of the relationships between the various enforcement and Fund-financed activities. In general, EPA identifies PRPs that may be liable for site reponse, attempts to negotiate agreements with the PRPs to perform the studies or cleanup, enters into settlements with the PRPs if they agree, and oversees the site work that the PRPs perform under the settlement. If the PRPs do not settle, EPA may issue an order or sue the PRPs to perform and/or pay for the cleanup, or EPA may conduct the cleanup itself and later pursue cost recovery from the PRPs. Each of these steps is discussed briefly below, and in more detail in the chapters that follow.

PRP Searches

When a site is proposed for listing on the NPL, EPA initiates a PRP search to identify any companies or individuals (PRPs) that may be liable for the costs of cleaning up the site. In addition to the RPM and contractors, the PRP search also may involve civil investigators and Office of Regional Counsel. The search involves detailed reviews of State, EPA and site records; interviews with site operators and transporters; and requests for information from those who may have been involved with the site. The PRPs that are identified by this process are then notified of their potential liability and are informed that they will have the opportunity to negotiate with EPA to conduct site cleanup. Chapter IV, PRP Identification/Notification, contains a detailed description of the PRP search process.

Negotiations

Formal negotiations with PRPs usually begin at two stages in the cleanup process; before the Remedial Investigation/Feasibility Study (RI/FS) and after EPA releases the Proposed Plan for public comment, or generally no later than when EPA signs the Record Of Decision (ROD). The purpose of these negotiations is to reach agreement that the PRPs will perform the RI/FS or the Remedial Design/Remedial Action (RD/RA) and pay past costs. During the course of negotiations, EPA and the PRPs exchange information on site conditions, the PRP's liability, past costs, and the nature of the work that will be required. Based on this information, EPA and the PRPs try to reach an agreement that the PRPs will both finance and conduct the work. If no agreement is reached, EPA may (1) issue an order to compel the PRPs to do the work, (2) sue the PRPs to require them to perform the work, and/or (3) use Federal funds to perform the work and seek to recover its costs later. The negotiation process is described in detail in Chapter V, RI/FS Negotiations, and Chapter VIII, RD/RA Negotiations.

Settlements

If negotiations are successful, EPA and the PRPs must sign a legal document that sets forth the requirements for cleanup. If the work required is an RI/FS, an RD, or a removal action, EPA and the PRPs usually use an Administrative Order on Consent (AOC). An AOC is a legally-binding administrative document, authorized by CERCLA, that EPA and the PRPs both sign. While a judicial Consent Decree (CD) may be executed, CDs are not the preferred mechanism for RI/FS or removal actions since administrative settlements may be processed more quickly. A CD is similar to an AOC, except that it is a judicial action which must be filed in court and be approved by a judge before it becomes final. If the settlement between EPA and the PRPs includes an RA, that settlement must be in the form of a consent decree. These settlement devices are discussed in Chapter V, RI/FS Negotiations and Chapter VIII, RD/RA Negotiations.

Oversight

Once the AOC or CD takes effect, the PRPs can begin work at the site. In the case of RD settlements, PRPs may begin work at the site before the CD is entered. EPA closely monitors all work at the site. This monitoring may include on-site examination of the PRPs or their contractors, review of all reports, and parallel sampling and analysis to ensure accuracy. Under CERCLA, the PRPs must agree to pay for EPA's RI/FS oversight expenses as part of the settlement. EPA also generally requires reimbursement of oversight costs for removals and RD/RAs. Chapter VI, RI/FS Implementation, describes the oversight process for RI/FSs, and Chapter IX, RD/RA Implementation, discusses the process as it relates to RD/RAs.

Cost Recovery

If negotiations with the PRPs are not successful, EPA can choose to perform the work and seek to recover its costs later. To recover its costs, EPA usually issues a demand letter, and if the PRPs do not reimburse EPA's costs, EPA refers a judicial action to the Department of Justice (DOJ) to bear upon the PRPs. If less than a total of $500,000 in response costs is involved at a facility, EPA can settle with the PRPs directly using an administrative order. If more than a total of $500,000 in response costs is involved at a facility, written approval of the Attorney General is required and EPA may have to take judicial action to settle the case. The cost recovery process is described further in Chapter XII, Cost Recovery.

Timeline

Each CERCLA site is unique and it is difficult to describe a typical site. The timelines in Exhibit I-1, however, depict the general flow of enforcement and response activities at a CERCLA site. The Agency's expectations about how long each activity should take are described in the OSWER Superfund Comprehensive Accomplishments Plan (SCAP) manual for the current fiscal year. The time frames described in that manual represent overall planning goals for the entire Agency. Individual site conditions may lead to longer or shorter durations for each activity. RPMs should refer to both the SCAP-planning durations and the specific conditions at the site in developing an overall site management plan. Site planning is discussed in detail in Chapter III, Comprehensive Site Planning.

An example of a site that generally followed a common timeline exists in Region III. This site was proposed for listing on the NPL in October of 1984, the PRP search was completed in February of 1985, and the site was finalized on the NPL in June of 1986. In May of 1985, Region III completed unsuccessful negotiations with the PRPs for the RI/FS and in June, a Fund-financed RI/FS was initiated for the first operable unit.

In March of 1988, the ROD for the first operable unit RI/FS was signed and RD/RA negotiations were initiated. Special notice letters were issued on March 29, and negotiations concluded within the 120-day moratorium at the end of July. A consent decree was agreed upon, and was lodged with the court. Following public comment, the decree was entered in the second quarter of FY 89. It requires the PRPs to complete the RD by the third quarter of FY 90 and the RA by the third quarter of FY 93.

In the fourth quarter of FY 88, the PRPs began an RI/FS for the site's second operable unit, which is scheduled to be completed in the second quarter of FY 90. Negotiations for the second operable unit RD/RA will last from the first to the fourth quarter of FY 90, and the PRPs will complete the RD/RA in the first quarter of FY 94. In addition to the remedial activity at the site, a removal was performed in response to emergency conditions. In February of 1985, the Region referred the case to recover approximately $250,000 for the cost of the removal. The cost recovery case was settled in May of 1987.

IV. KEY PLAYERS

The Superfund enforcement program requires close coordination among many different players within EPA, in other Federal agencies, and in the States. This handbook, however, focuses mainly on the roles played by technical enforcement staff. While these roles vary greatly among the Regions, they generally include initiating negotiations, settlements, and cost recovery actions, and taking the lead in overseeing PRP response actions.

The RPM plays the lead role in planning and coordinating site remediation. To achieve programmatic objectives, the RPM must have effective plans and be a team builder and leader. In addition to personnel from Federal agencies and the States, other Regional staff, such as RPMs managing Fund-lead sites, staff from the Environmental Services Division (ESD), Community Relations staff, and Office of Regional Counsel (ORC), may play active roles. In Regions where enforcement and remedial responsibilities are divided, RPMs on Fund-lead sites may become involved in enforcement activities when the sites are ready for RD/RA negotiations, or they may become involved in litigation for cost recovery. Similarly, ESD staff may become involved at a site when the removal program is in that Division or when sampling and analysis work is required.

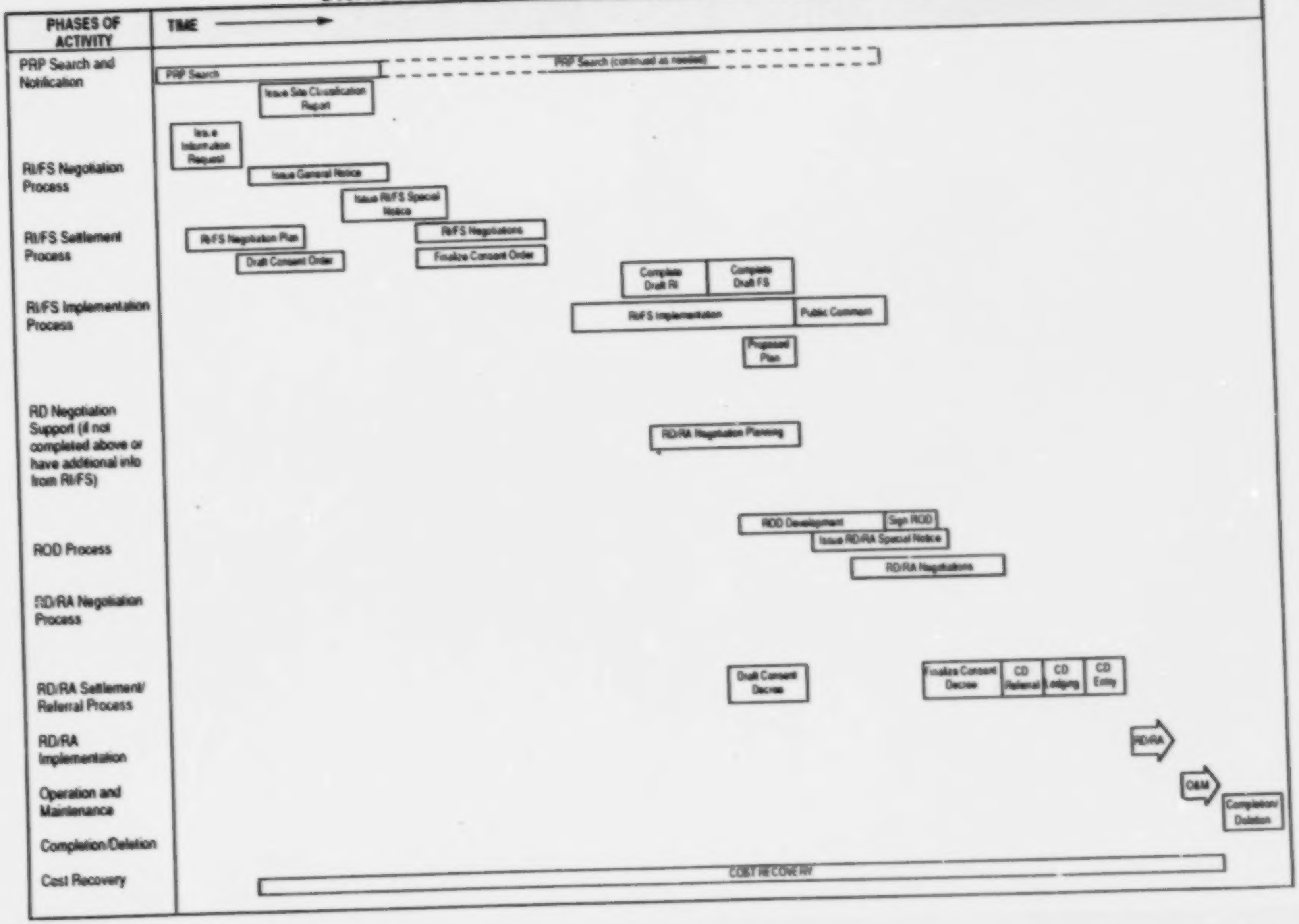
Attorneys from ORC act as the Region's primary legal advisors whenever an enforcement action is taken at a site, in addition to their non-enforcement duties. They often take the lead in negotiations with PRPs, review information exchanges between EPA and PRPs, and are the primary communication link between the Agency and the Department of Justice (DOJ) if EPA sues the PRPs for either site cleanup or cost recovery.

At Headquarters, there are two major offices that participate in the program. Within OSWER, OWPE takes the lead in managing the overall enforcement program. This includes developing budgets and out-year forecasts, managing the SCAP process, developing policy and guidance, and providing technical assistance and coordination when necessary. OERR has responsibility for NPL listing and, with regard to Fund-financed response actions, removal and remedial actions.

In addition to OWPE and OERR within OSWER, OECM provides legal advice and coordination for all formal enforcement actions, with a particular focus on judicial cases. In major cases, OECM reviews case referral packages before they are sent to DOJ. They also comment on major precedent-setting settlements, as does OWPE.

Exhibit I-1

Overview Flowchart of SARA Enforcement and Remedial Process



6.a

Other Federal Agencies

In addition to EPA, DOJ is significantly involved in the Superfund enforcement program. DOJ is involved in any enforcement action that must be filed in court and serves as a resource in all negotiations that may result in a consent decree. DOJ develops and presents legal positions that explain the Agency's goals to PRPs and the court, and provides the only communication between EPA and the courts regarding site-specific litigation. In addition, it is the official representative of EPA in negotiations that take place while a case is pending before a court. As noted earlier, DOJ must also approve any claim that is compromised and settled, whether by consent decree or by administrative order on consent, where the total response costs at the site exceed $500,000.

Other Federal agencies, such as the U.S. Coast Guard and the U.S. Army Corps of Engineers, also may become involved in the program when their technical expertise is required. For example, the Corps has extensive expertise in the management of large-scale construction projects and, therefore, can be helpful in the management of remedial actions.

States

The role of the States in the program is substantial. States usually participate in the ROD process and may participate in settlement negotiations with PRPs. In addition, States may take a lead role at a site by negotiating directly with the PRPs and issuing orders under State legal authority.

Natural Resource Trustees

At any site where natural resources may have been damaged, EPA must coordinate with the trustee of those resources. The trustee may be a Federal agency, such as the Department of Interior, the National Oceanic and Atmospheric Administration, or the Department of Agriculture, or it may be a State agency (designated by a governor) or there may be both Federal and State trustees for the site. EPA notifies natural resource trustees of settlement negotiations with PRPs and allows trustees to participate in negotiations regarding matters within their domain.

REMOVALS

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
Definition 1
  Authority 1
Types of Removals 2
Removal Activities 2
Statutory Limitations and Exemptions 3
Administrative Record and Public Participation 4
Written Response 4

II. PROCEDURES AND INTERACTIONS 5

- A. PRP Search 5
  - PRP Response Policy 5
  - PRP Search Strategy 5
  - Emergency Situation 5
  - Time-Critical Situation 6
  - Non-Time-Critical Situation 6
  - All Removals 6
  - PRP Search Completion 6
- B. Enforcement and Negotiations Planning 6
  - Site Lead 7
  - Enforcement Strategy -- Addendum to Action Memo 7
- C. PRP Notice 8
  - Notification in Emergency Situations 9
  - Notification in Time-Critical Situations 9
  - Notification in Non-Time-Critical Situations 9
- D. AOC Negotiations and AOU Assistance 9
  - Administrative Orders on Consent (AOC) 10
  - Unilateral Administrative Orders (AOU) 12
  - Issuance of AOUs 12
  - Activation of Fund During AO Issuance 13
  - Replacement of AOU with AOC 13
  - Enforcement of AO 13
- E. Oversight Of PRP Response 13
  - Oversight Costs 14
- F. Criminal Investigation 14
- G. Community Relations 14
  - Community Relations Plan 15
  - Community Relations Activities 15

III. PLANNING AND REPORTING REQUIREMENTS 16

- A. Contractor Support 16
- B. Information Management Systems 16

SCAP/SPMS 16
ERNS 17
    Notification System Process 17
    EPA Regional ERNS Responsibilities 18
    EPA Headquarters Responsibilities 18
    ERNS Phase II 18
IFMS 18

IV. POTENTIAL PROBLEMS/RESOLUTIONS 19

A. Civil Investigator Support 19
B. Determining PRP Financial Viability 19
C. Use of Information Request Letters 19

V. REFERENCES 20

Guidance 20
Manuals 20

REMOVALS

I DESCRIPTION OF ACTIVITY

Introduction

This chapter discusses enforcement activities associated with removal actions. This chapter applies to conventional removals rather than actions funded as removals (i.e., RI/FS and RD). Generally, removal activity, including activity to secure and oversee potentially responsible party removal actions, is managed by On-Scene Coordinators (OSCs). This chapter was written primarily to assist OSCs in planning and conducting enforcement activities. However, depending on the particular circumstances at a site, other program personnel may assume lead roles in removal enforcement activities. At sites where remedial activity is ongoing, the RPM may play a key role in securing and overseeing PRP removal response. For convenience, only the term "OSC" is used throughout this chapter, although the information is the same for RPMs when appropriate. Exhibit II-1 provides a broad overview of the removal enforcement process.

Specific procedures and guidance for the Removal program are set forth in OSWER Directive 9360.0-03B, the Superfund Removal Procedures Manual (February, 1988). Chapter V of the Superfund Removal Procedures Manual sets forth specific procedures for pursuing enforcement actions at a removal site.

Definition

Removal actions are defined in section 101(23) of CERCLA as "the cleanup or removal of released hazardous substances from the environment, (and) such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment..." This definition also includes actions necessary to:

- Monitor, assess and evaluate the actual or threatened release
- Dispose of removed material
- Protect public health or welfare or the environment from an actual or threatened release
- Investigate and gather information (as authorized by section 104(b) of CERCLA).

Sections 104(a) and (b) also authorize responses and studies regarding releases and threatened releases of pollutants or contaminants which may endanger human health, welfare or the environment.

Authority

Section 104(a) of CERCLA authorizes the President to act, consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (NCP, 40 CFR 300), to remove or arrange for the removal of any hazardous substance, pollutant or contaminant if the President deems it necessary to protect the public health or welfare or the environment. Section 104(b) of CERCLA authorizes studies and investigations and section 106 of CERCLA authorizes the President to order measures necessary to abate imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. Section 106 also sets forth fines for any person who, without sufficient cause, willfully violates or fails or refuses to comply with a section 106 order. Specific standards and procedures for implementing CERCLA and for conforming with other statutes are set forth in the NCP.

Types of Removals

EPA has classified removals into the following three categories based upon the site evaluation and the urgency of the situation:

- Emergencies--removals where the release, or threat of release, requires that on-site cleanup activities begin within hours of the lead agency's determination that a removal action is appropriate

- Time-Critical--removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a period of less than six months available before cleanup activities must begin on site

- Non-Time-Critical--removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a planning period of more than six months available before on-site activities must begin. The lead agency must undertake an Engineering Evaluation/Cost Analysis (EE/CA), or its equivalent, for non-time-critical removals.

The urgency determination is a deciding factor in determining the amount of time that can be devoted to a PRP search prior to on-site action, negotiation length, the type and timing of public participation, whether an EE/CA must be conducted, and the extent of compliance with other environmental statutes.

Removal Activities

According to section 101(23) of CERCLA and section 300.65 of the NCP[1] , the response activities listed below may be appropriate removal actions in certain situations. This list is neither intended to limit response officials from taking other actions deemed necessary under the circumstances, nor is it intended to preclude the lead agency from referring response actions to other appropriate Federal or State enforcement authorities.

- Fences, warning signs, or other security or site control precautions--where humans or animals have access to the release;

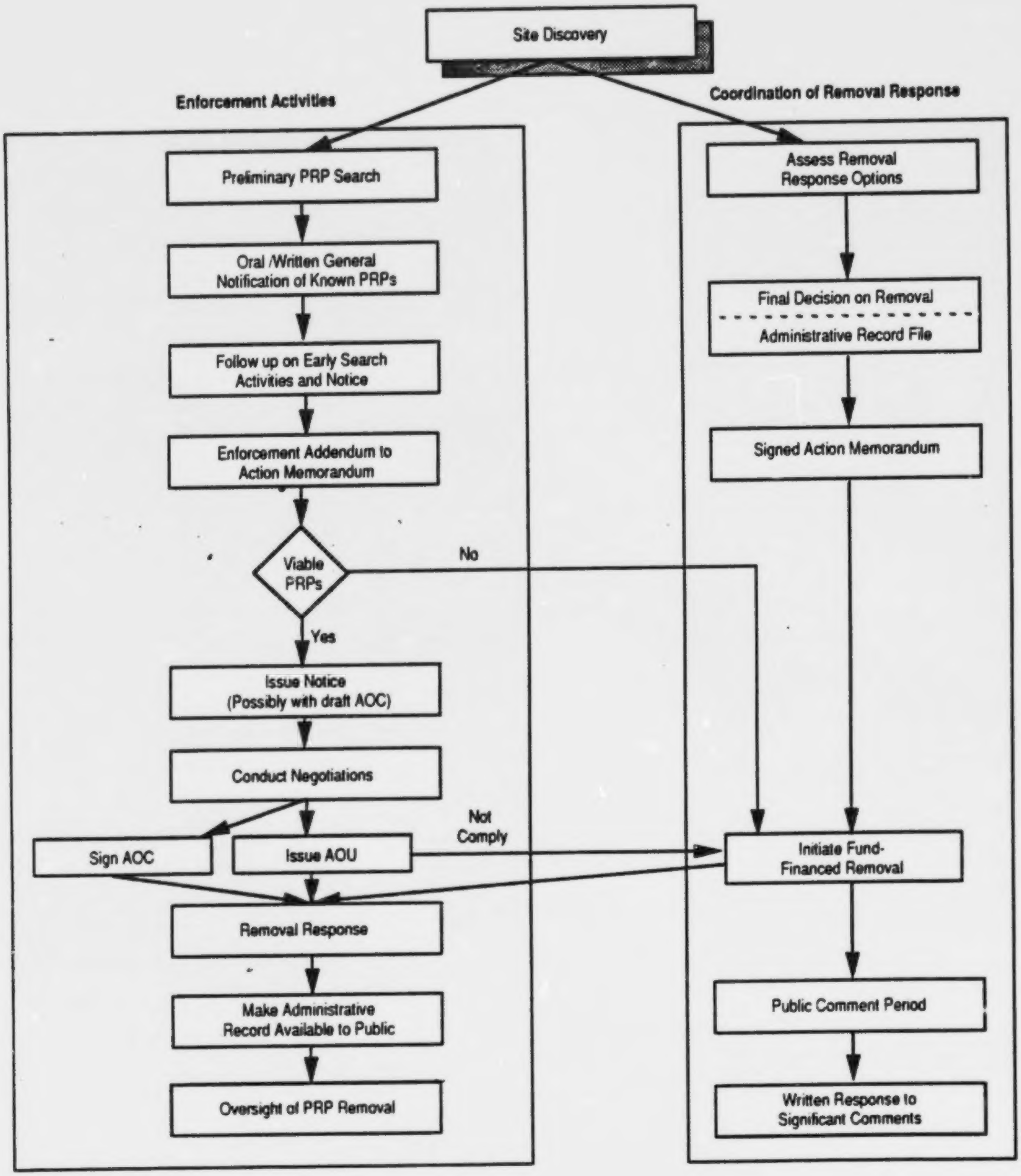
- Drainage controls (e.g., run-off or run-on diversion)--where precipitation or run-off from other sources (e.g., flooding) may enter the release area from other areas;

---

[1] The 1985 NCP is effective, until amended, except as modified by SARA. The proposed revisions, 53 FR 51394 (December 21, 1988) are not yet effective. However, they may serve as guidance where SARA required changes to the program.

Exhibit II-1

Overview Of Removal Enforcement Activities Relationship to Response Activities


Site Discovery
Enforcement Activities
Coordination of Removal Response
Preliminary PRP Search
Oral /Written General Notification of Known PRPs
Follow up on Early Search Activities and Notice
Enforcement Addendum to Action Memorandum
Viable PRPs
No
Yes
Issue Notice (Possibly with draft AOC)
Conduct Negotiations
Sign AOC
Issue AOU
Not Comply
Removal Response
Make Administrative Record Available to Public
Oversight of PRP Removal
Assess Removal Response Options
Final Decision on Removal
Administrative Record File
Signed Action Memorandum
Initiate Fund-Financed Removal
Public Comment Period
Written Response to Significant Comments

* This general overview of removal enforcement may not apply in all situations, especially emergencies

- Stabilization of berms, dikes, or impoundments--where needed to maintain the integrity of the structures;

- Capping of contaminated soils or sludges--where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground water, or air;

- Using chemicals and other materials to retard the spread of the release or to mitigate its effects--where the use of such chemicals will reduce the spread of the release;

- Removal of highly contaminated soils from drainage or other areas--where removal will reduce the spread of contamination;

- Removal of drums, barrels, tanks, or other bulk containers that contain or may contain hazardous substances or pollutants or contaminants--where it will reduce the likelihood of spillage; leakage; exposure to humans, animals or food chain; or fire or explosion;

- Provision of alternative water supply--where it will reduce the likelihood of exposure of humans or animals to contaminated water.

Statutory Limitations and Exemptions

Section 104(c) of CERCLA specifies that Fund-lead removals may not exceed either $2 million in cost or 12 months in duration. The criteria for exceeding the statutory limits (which do not apply to PRP-lead removal actions) include:

- An immediate risk to public health, welfare or the environment exists; continued response actions are immediately required to prevent, limit or mitigate an emergency; and such assistance otherwise will not be provided on a timely basis.

- Continued response action is otherwise appropriate and consistent with the remedial action to be taken.

OSCs who request an exemption to the statutory limits on cost or duration for a Fund-lead removal action should first ensure that all potential avenues of securing PRP cleanup or funding for cleanup have been pursued. Headquarters carefully reviews all cost exemption requests for Fund-lead removal actions for evidence of activity to secure PRP participation in the cleanup. The following enforcement-related information should be included in the exemption request Action Memorandum:

- Extent of the PRP search

- Whether PRPs have been identified

- Financial status of PRPs, if PRPs have been identified

- Whether notice letters (special or general) were issued
- Whether previous negotiations have been held with the PRPs and the results of those negotiations
- Whether an AO has been issued to the PRPs or previous demands for reimbursement have been made
- Status of the Administrative Record
- Enforcement history of the site
- Enforcement options, discussion and recommendations.

Specific procedures for obtaining exemptions to the statutory limits on Fund-lead removals are set forth in the Superfund Removal Procedures Manual.

Administrative Record and Public Participation

Section 113(k) of CERCLA requires that the Agency establish an Administrative Record for selection of CERCLA response actions. The Administrative Record is the body of documents upon which the Agency bases its selection of a response action. Section 113(k)(2) of CERCLA requires that EPA develop procedures for appropriate participation of interested parties in the development of an Administrative Record for a removal action. The Administrative Record should consist of documents that the Agency considered or relied on to select the response action and when appropriate, include documents demonstrating the public's opportunity to participate in the selection of the response action. More information on the Administrative Record is contained in Chapter XV, Records Management.

Among the key components of the Administrative Record are the Action Memorandum and underlying inspection reports and data.

The proposed revisions to the NCP and associated preamble constitute guidance on development and maintenance of the Administrative Record and public participation requirements. In addition, guidance on Administrative Records is provided in OSWER Directive 9833.3A, "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989). Exhibit II-2 depicts the various proposed activities EPA is considering as requirements when establishing an Administrative Record for each of the removal categories defined earlier in this chapter. The requirements for each removal category differ to ensure that the Administrative Record does not unduly create delays in emergency and time-critical removal actions. OSCs and RPMs should refer to OSWER Directive 9833.3A cited above, for information on the specific documents that should be included in Administrative Records for removal actions.

Written Response

A written response to significant comments received during the public comment period should be included in the Administrative Record file along with the comments. It serves to document how public comments have been considered during the decision-making process and to provide answers to significant comments raised.

Exhibit II-2

Proposed Community Relations And Administrative Record Requirements For Removals

Activity	Time-critical[1] Where on-site activity lasts less than 120 days (includes emergencies)	Time-critical[1] Where on-site activity lasts more than 120 days	Non-time-critical[2]
Designate spokesperson	X	X	X
Notify affected citizens	X	X	X
Establish Administrative Record (AR) file	X	X	X
Make AR available when EE/CA approval memorandum is signed			X
Make AR available within 60 days of initiation of site activity	X	X	
Place AR in central location	X	X	X
Place AR at or near facility	X*	X	X
Notify public of AR	X	X	X
Provide a 30 day comment period from date AR is available	X**	X	X
Prepare written response to significant comments	X	X	X
Conduct community interviews		X	X
Prepare Community Relations Plan		X	X

[1] Removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a period of less than six months available before on-site activities must be initiated

[2] Removals where, based on the site evaluation, the lead agency determines that a removal action is appropriate and that there is a planning period of more than six months available before on-site activities must begin

* The AR file for emergency removal actions where on-site activities cease within 30 days of initiation need only be available for public inspection at the central location.

** Where appropriate

I PROCEDURES AND INTERACTIONS

A. *PRP Search* PRP searches are discussed in detail in Chapter IV, PRP Search, Notification, and Information Exchange. The urgent nature of emergency removal actions may require response initiation prior to an extensive PRP search that goes beyond identifying the owner/operator. This section discusses PRP searches related to removal actions.

PRP Response Policy Where PRPs are known and able to perform the removal, EPA prefers that they undertake the response action pursuant to an administrative order. A PRP investigation should be a part of the preliminary assessment that an OSC conducts under section 300.64 of the NCP. To the extent appropriate under the circumstances, the OSC is to search further for responsible parties and attempt to have them perform the necessary removal action. In addition, supplemental searches may be warranted during a stabilization action for PRP takeover of the disposal and for cost recovery if the removal is conducted with use of the Fund.

PRP Search Strategy A PRP search strategy is important. As background to conducting removal PRP searches, the general steps in the PRP search process are described in Chapter IV. The level of effort of the PRP search and period of performance of search tasks in removals depend on the amount of time between discovery and the execution of the Action Memorandum, the urgency of the release situation, the likely expenditures on the removal, and available resources. For descriptive purposes, Exhibit II-3 shows how the level of effort tends to vary with urgency. While the amount of removal expenditures affects the expenditures for a PRP search, this concept is not depicted by the chart. Information gathered during the PRP search, such as that indicated by the activities in Exhibit II-3, is essential to support an enforcement strategy at Superfund sites.

In many removal situations, effective PRP searches depend partially on the presence in the field of the personnel conducting the search. To realize the advantage of having PRP research conducted partially in the field, and as a matter of standard procedure, the enforcement project manager, if different from the OSC, should consult with the OSC on the PRP search as well as other aspects of the case. It is important that search activities be well-documented even if the result is that no viable PRPs are identified.

Emergency Situation In emergency situations where the PRP is not immediately known, the OSC usually conducts the PRP search in two phases. Initially, streamlined procedures, consisting of oral inquiries of municipal officials and reasonably available on-site sources, as well as reviews of readily available site records are implemented. Oral inquiries should be documented as soon as practicable. Obvious visual information of possible PRP links to the site should be recorded if time permits. TAT or TES support under an expedited work assignment may be employed. The OSC should, to the extent possible, prioritize and expedite certain search activities to support the notice, negotiation and administrative order process before the removal begins. Once the site is stabilized, the second phase of PRP identification efforts should continue. This phase of the PRP search may support cost recovery efforts and partial-work orders. Depending on response expenditures, available resources and the site strategy, the civil investigator and contractor (e.g., TES) may provide assistance on the follow up search.

Time-Critical Situation

In time-critical situations, the OSC should follow procedures that expand upon the PRP search activities discussed for emergency situations. Title searches and on-site interviews also should be undertaken (OSCs should coordinate with civil investigators to determine what information needs to be obtained). OSCs also may use 104(e) information requests that include questions pertaining to financial viability to obtain additional evidence during the PRP search.

Non-Time-Critical Situation

At a minimum, the OSC should conduct the same preliminary PRP search measures discussed above. In addition, depending on the level of expenditures and the amount of time available, the OSC may take additional steps, such as further questioning of persons on or near the site and on-site investigation for names of PRPs (e.g., records review). After the OSC has made a preliminary effort to identify PRPs, he or she may request Regional enforcement personnel to conduct a potentially responsible party search to identify generators and transporters. A baseline report as described in Chapter IV should be prepared and decisions should be made on specialized tasks. Where PRPs do not conduct the work, an interim final report will be necessary.

Technical Enforcement Support (TES) contracts, Technical Assistance Team (TAT) contract support, or civil investigators may be used to support PRP searches in non-time critical situations. Other support may be available through the use of 8(a) (i.e., minority or disadvantaged contractor set-aside) contractors. OSCs also may request the assistance of the National Enforcement Investigation Center (NEIC) in conducting a PRP search.

All Removals

OSCs should be prepared to obtain the necessary approval to conduct a Fund-lead response if no PRPs can be identified. However, the initiation of a Fund-lead response does not mean that the search for PRPs is discontinued. During a Fund-financed removal, OSCs should fully document possible evidence of liability at the site in anticipation of cost recovery litigation. Documentation activities include photographing the site to verify site conditions and obtaining evidence of PRP links to the site such as site records identifying owners/operators. OSCs may utilize TAT contractors in gathering information that may help establish a party's status as a PRP. Efforts to locate PRPs should continue throughout the removal action to support cost recovery efforts and possible PRP involvement in any future response actions.

PRP Search Completion

As noted in Chapter IV, PRP search reports usually should not be viewed as complete PRP searches. In most multi-party cases where substantial funds are spent, specialized tasks also will be utilized to provide adequate information beyond the baseline report. Exhibit II-3 shows the information that the PRP search effort should include or yield to meet the target of a completed PRP search.

B. *Enforcement and Negotiations Planning*

After initiating the search for PRPs, but prior to issuing notice, decisions must be made regarding the site lead and enforcement strategy. Careful planning during this phase of the removal helps ensure that negotiations and other enforcement activities will be conducted with greater success.

Exhibit II-3

PRP Search Activities

Level of Effort

Emergency	Time-Critical	Non-Time-Critical
Follow up search conducted later. Preliminary search • Gather visual evidence from site • Conduct on-site interviews • Consult municipal officials • Review readily available site records	• Use TAT for preliminary activities • Issue 104(e) information requests • Document additional evidence linking PRP to site (e.g., photos) • Conduct a title search (coordinate with civil investigator) • Conduct off-site interviews • Review relevant site records • Gather visual evidence from site • Conduct on-site interviews • Consult municipal officials • Review readily available site records	• Prepare interim final PRP search report • Issue 104(e) information requests regarding generators and transporters • Prepare baseline PRP search report • Document additional evidence linking PRP to site (e.g., photos) • Conduct a title search (coordinate with civil investigator) • Conduct off-site interviews • Review relevant site records • Gather visual evidence from site • Conduct on-site interviews • Consult municipal officials • Review readily available site records

Urgency of the Situation

*Note: Example for descriptive purposes only; some work may follow response actions

Site Lead

When viable PRPs have been identified, every attempt should be made to secure PRP conduct of the removal activities. However, site lead decisions must be based on the exigencies of the particular situation. Primary factors to be considered in making a site lead decision include:

- Immediacy of the need to respond
- Strength of the case on PRPs' liability
- Financial viability of the PRPs.

Other criteria to be considered include:

- Ability and need to precisely define the removal
- Unique technical problems, including oversight
- Technical capability of the PRP to conduct the removal
- Willingness of PRPs to conduct the removal (lack of willingness does not preclude an AOU)
- Availability of the Fund
- Cost of the removal (very low-cost removals have low priority for enforcement).

In addition, consideration should be given to the workload of the Regional staff and the extent of oversight activities.

Enforcement Strategy -- Addendum to Action Memo

Except in true emergencies, prior to initiating the PRP notification process, the OSC should prepare a brief strategy that details the information and activities needed to successfully plan a removal action. An "Enforcement Sensitive" attachment that includes information on the enforcement strategy, PRP response, and previous actions should accompany the Action Memorandum for the site. If time permits, the enforcement staff should undertake the following activities when preparing for negotiations with PRPs:

- Review results of preliminary PRP search efforts for adequacy and accuracy and supplement as necessary
- Determine notification strategy
- Review problems posed by site
- Develop clear statement of work to be done consisent with draft Action Memorandum

- Prepare draft Administrative Order (AO)
- Develop negotiations strategy.

Preparing a brief negotiations strategy prior to the initiation of negotiations helps ensure that the OSC has considered various aspects of the situation which could affect removal activities. For example, at a drum site the OSC should attempt to establish the number of drums, how many are leaking, how many are overpacked, and any other information that would affect plans for removal activities. Obtaining this information also prepares the OSC for the first round of negotiations with the PRP, which can be jeopardized by inadequate preparation and unclear cleanup goals. The statement of work should be attached to the notice letter that advises PRPs of their potential liability and possibly initiates negotiations with EPA for conducting the removal.

C. PRP Notice

Where PRPs have been identified, EPA's general policy is to notify PRPs of their potential liability and to advise them of the intended response action. Where the circumstances allow, there often will be two notice letters: (1) notice of liability and (2) notice of an opportunity to negotiate to conduct the removal (negotiations are discussed in Section D of this chapter). In emergencies and some time-critical removals, these notice letters and the negotiations processes may be combined. Moreover, in emergencies, the notification process may involve oral notification of identified PRPs, which should be confirmed with a written notice letter.

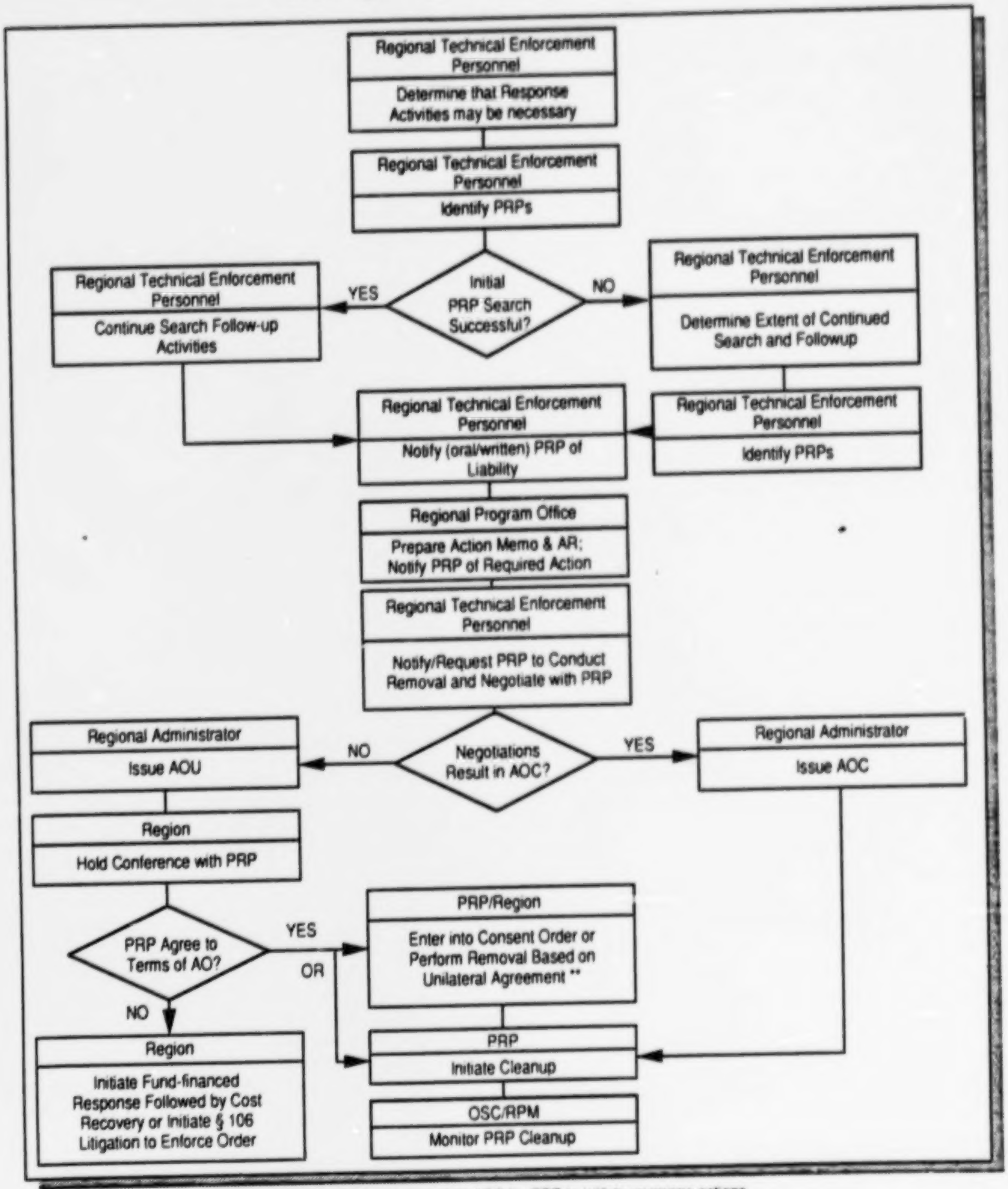
The content of notices vary depending on whether:

- The notice will be used simply to notify PRPs of their potential liability; it may further advise the PRP of an action EPA has already taken or is about to take;
- The notice will be used to encourage a private party response through negotiations;
- The notice will be used as a mechanism for invoking the section 122(e) special notice procedures which provide for negotiations with a formal moratorium on response. Emergency and time-critical removals do not follow special notice procedures due to the urgency of these situations.

Where possible, the Regional program office should send notice letters to all known PRPs prior to the initiation of the removal action. The OSC must consult and coordinate with Regional enforcement staff in notifying PRPs of their potential liability and requesting removal action by the PRP. Execpt in limited emergency situations, it is inappropriate to provide initial notice by a unilateral administrative order. Exhibit II-4 identifies the steps involved in securing potentially responsible party action. OSCs should refer to Chapter V of the Superfund Removal Procedures Manual and OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987) for policies and procedures concerning the notification process. Also, OSWER has distributed model notice letters (OSWER Directive 9834.10, "Model Notice Letters," February 7, 1989) and most Regions have their own models.

Exhibit II-4

Securing PRP Action for Removals


Regional Technical Enforcement Personnel
Determine that Response Activities may be necessary
Regional Technical Enforcement Personnel
Identify PRPs
Initial PRP Search Successful?
YES
NO
Regional Technical Enforcement Personnel
Continue Search Follow-up Activities
Regional Technical Enforcement Personnel
Determine Extent of Continued Search and Followup
Regional Technical Enforcement Personnel
Notify (oral/written) PRP of Liability
Regional Technical Enforcement Personnel
Identify PRPs
Regional Program Office
Prepare Action Memo & AR; Notify PRP of Required Action
Regional Technical Enforcement Personnel
Notify/Request PRP to Conduct Removal and Negotiate with PRP
Negotiations Result in AOC?
NO
YES
Regional Administrator
Issue AOU
Regional Administrator
Issue AOC
Region
Hold Conference with PRP
PRP Agree to Terms of AO?
YES
OR
NO
PRP/Region
Enter into Consent Order or Perform Removal Based on Unilateral Agreement **
Region
Initiate Fund-financed Response Followed by Cost Recovery or Initiate § 106 Litigation to Enforce Order
PRP
Initiate Cleanup
OSC/RPM
Monitor PRP Cleanup

** AOU does not have to be converted to AOC for PRP to initiate response actions.

Notification in Emergency Situations

In emergencies, the OSC may notify known PRPs orally. The Regional program office then should prepare and send a general notice letter to the PRP confirming the oral notification of liability and any request for response. The Regional program office should send the notice letter as soon as possible following the oral notification. While a written notice letter typically precedes the initiation of an administrative order (discussed in section D of this chapter), this is not necessary in emergencies, given the limited time available.

Notification in Time-Critical Situations

In time-critical situations, the OSC may initially notify PRPs orally and follow the same procedures as in an emergency. Whenever possible, it is preferable that notice letters be issued before the removal action. Moreover, the OSC should conduct a review of and follow up on preliminary PRP search activities to ensure all reasonably known PRPs have been identified. The extent to which PRP search activities may be reviewed and upgraded is dependent on the urgency of site conditions.

Notification in Non-Time-Critical Situations

In non-time-critical situations, procedures for obtaining PRP response are more likely to involve formal negotiations which may be invoked by issuance of a special notice or section 122(e) letter. First, the PRP search should be reviewed and any outstanding leads pursued during the drafting of the proposed EE/CA. The PRP search review and follow-up activities should include the use of section 104(e) information requests (see section IV of this chapter). Notice letters should be issued to PRPs and, depending on the response, an Agency team of Regional technical and legal personnel should quickly schedule negotiations aimed at securing PRP cleanup within an established period of time.

The use of the special notice procedure should only be considered for non-time-critical removal actions because the issuance of a special notice triggers a 60-120 day moratorium on EPA action and a specific time frame for negotiations. Therefore, CERCLA section 122(e) special notice procedures should be used only for those removals where site activity need not commence for 60-120 days following issuance of the notice letter.

D. AOC Negotiations and AOU Assistance

The site lead determination and enforcement strategy (see section B of this chapter) will determine the general approach to negotiating activity at the site. Where negotiations are part of the strategy and time allows, the preferred approach to negotiations is to send the PRP a notice letter specifying the work to be done and establishing a time frame for negotiation of an Administrative Order on Consent (AOC). Where possible, it is advantageous to send the PRPs a model AOC, with the letter or as soon thereafter as possible. While it is appropriate to advise PRPs that EPA may issue a Unilateral Administrative Order (AOU) if they do not consent to an AOC, unilateral orders are not preferred where an AOC is possible. In addition, informal agreements are not credited by Headquarters. For leverage in negotiating an AOC, it often is helpful to have a signed Action Memorandum. The preferred outcome of the negotiations is an AOC.

The time period for negotiations should reflect the exigencies of site conditions; the nature of the work being discussed; and the response of the PRPs to prior communications. In non-time-critical situations where EPA has issued a special notice and the PRP has responded with a good faith offer, an automatic 60-120 day moratorium on EPA activity at the site establishes a fixed period during which negotiations may occur.

It is very important to have a detailed technical scope of work when entering into negotiations.

Enforcement staff may take the following steps when conducting negotiations with PRPs:

- Meet with PRPs
- Negotiate language in the administrative order
- Negotiate technical points and schedules in the workplan
- Enter into an AOC, to which PRPs agree and sign, or issue an AOU, in which PRPs do not execute their consent by signing.

Due to the time-sensitive nature of removal incidents, the negotiation process is often accelerated and certain steps described above may be eliminated. The negotiations schedule should be specified to PRPs in writing.

In some instances, it may take as little as two weeks to conduct negotiations and sign an administrative order on consent; however, it can take several months depending on the progress of negotiations. For simple removals, the order may detail work to be done. For more complex removals, the order often provides the scope of work for later response activities and requires the PRP to draft the detailed work plan as a deliverable if the OSC has not already written the work plan. This enables the AOC to be signed and the PRP to initiate stabilization measures at the site before a completed work plan has been agreed upon.

In some cases, Regional personnel may find that PRPs wish to negotiate to conduct a portion of the removal action. The PRP may be financially or technically unable to completely address some of the contamination at the site. It may be appropriate to have the PRP undertake simple tasks (e.g., security) as well as others that he can accomplish. Where the PRP appears to be incompetent or lacks substantial resources, it often is preferable to initiate a Fund-lead response. At some non-emergency removals, there may be viable PRPs that are willing to settle by conducting only a portion of the work so that EPA will pursue other PRPs for the remainder by unilateral order and/or cost recovery action. If the nature of the removal and the universes of PRPs who would settle and would not settle warrant such an order, this is known as a "carve out" order.

Administrative Orders on Consent (AOC)

As noted earlier, the preferred product of negotiations is a CERCLA section 106(a) Administrative Order on Consent (AOC), also known as a consent order. Removal AOC provisions may include the following:

- **Introduction:** Establishes that the AOC is a voluntary agreement.

- **Jurisdiction:** Describes the authority under which EPA has issued the order.
- **Parties Bound:** Lists to whom the order applies and directs them to provide copies of the order to any successors, subsequent owners, or contractors.
- **Statement of Purpose:** States the objectives of the order.
- **Findings of Fact:** Provides enough factual information to establish the Conclusions of Law and provide a predicate for the work to be performed.
- **Conclusions of Law**: States that the respondent(s) has been identified as a responsible party and why the Agency has determined it to be appropriate to conduct a removal action.
- **Notice to the State:** States that notice of issuance of this order has been provided to the appropriate State.
- **Work to be Performed:** Specifically describes the work to be conducted as divided into tasks. A standard first task that should be added for unilateral orders is a requirement that respondents provide verbal and written notice of their intent to comply within days of issuance of the order.
- **Quality Assurance**: Specifies QA/QC requirements.
- **Modifications to the Work to be Performed:** Describes how modifications may be achieved.
- **Administrative Record File:** States that EPA determines the content of the Administrative Record.
- **Designated Project Coordinators:** Requires designation of project coordinators.
- **Site Access, Record Availability, and Record Preservation:** Requires respondent(s) to provide or secure acces to the site, to provide access for EPA to review any records, and to preserve site files for a minimum of nine years.
- **Dispute Resolution:** States agreed upon dispute resolution procedures.
- **Delay in Performance/Stipulated Penalties:** Establishes a violation list and stipulated penalties for each such violation.
- **Force Majeure:** States force majeure provisions.
- **Oversight Reimbursement:** Requires oversight reimbursement.
- **Payment of Past Costs**

- **Reservation of Rights and Reimbursement of Other Costs:** Reserves EPA's right to bring action against respondent(s) to complete this work, or for other work and for costs. Also states that nothing in the order releases the respondent(s) from other claims filed by other parties.

- **Disclaimer:** Releases respondent(s) from admission of guilt by signing the order.

- **Effective Date:** Establishes the order's effective date.

- **Termination and Satisfaction:** States that EPA will give the respondent(s) written notification when it has determined the order to be completed.

Unilateral Administrative Orders (AOU)

In emergency and some time-critical situations, Regional staff may find it necessary to bypass negotiations and immediately issue a Unilateral Administrative Order (AOU). In addition, if viable PRPs fail to respond appropriately to the oral/written notification and negotiation process described above, Regions should pursue issuing a CERCLA section 106 AOU unless there is good reason not to issue an order. The following criteria must be satisfied to issue an order:

- Liable parties have been identified

- There is evidence of a release or threat of a release of a hazardous substance

- There is evidence that the release is from a facility

- Site conditions may present an imminent and substantial endangerment (Note: the courts have interpreted this standard very broadly and have not required a finding of immediate threat)

- The affected State has been notified

- The removal is not inconsistent with applicable law (see CERCLA and the NCP).

Unilateral orders are an effective way to achieve PRP response in situations where there is insufficient time to pursue thorough negotiations, or the PRP is unwilling to conduct the cleanup pursuant to an AOC. The provisions of an AOU are similar to an AOC, except that more detailed findings of fact are stated. Also, AOUs usually contain a provision requiring noticed intent to comply within a specified period and the AOU usually does not contain past costs, stipulated penalties, dispute resolution, or force majeure clauses.

Issuance of AOUs

Regional enforcement staff should issue an AOU before Fund activation whenever a PRP has been identified (unless the PRP is non-viable), provided the criteria for site lead discussed earlier in section B are met and the order is within Regional resources. The

OSC and other Regional personnel should continue the process of obtaining approval for a Fund-financed action, providing the PRP does not comply.

Activation of Fund During AO Issuance If site conditions warrant, the OSC should immediately initiate on-site response activities while the AO process continues. PRP takeovers of removals are limited. Where appropriate, at a convenient break in the response activities, EPA may demobilize its contractor and the PRP may assume responsibility for the remaining activities required. In such cases, the AO should be revised to reflect the PRP takeover.

Replacement of AOU with AOC The recipient of the AOU may agree to comply with the terms of the order. In some cases, EPA may withdraw the unilateral order when it is replaced by an administrative order on consent. EPA generally does not devote a significant amount of time to a second round of negotiations.

Enforcement of AO Non-compliance with AOs is determined through the oversight process. There are two kinds of noncompliance:

- No major response to the order, and
- A response that does not satisfy the order.

If the recipient does not comply with the terms of the order, EPA usually will proceed with a Fund-financed response and subsequent suit for cost recovery under CERCLA section 107 (including punitive treble damages if the PRP did not have sufficient cause for non-compliance with an AO).

In certain situations EPA, with DOJ assistance, will enforce the terms of the order and compel PRP response through judicial enforcement actions under section 106 of CERCLA. Although the Agency has the authority to refer a section 106 action (e.g., filing a section 106 complaint), it is often preferable not to do so when Fund monies are available and the delays of litigation are inconsistent with program direction. Violation of an AOU will set up a treble damage and penalties action under section 107 of CERCLA.

Guidance on the issuance of administrative orders for removals is currently being revised by the Office of Waste Programs Enforcement (OWPE) and the Office of Enforcement and Compliance Monitoring (OECM) in Headquarters.

E. Oversight Of PRP Response An AO prescribes the activities the PRP must undertake. It also prescribes the completion date for the entire response as well as the discrete parts of the response (including oversight provisions and associated costs).

Regional personnel responsible for monitoring PRP compliance should either remain on site or visit the site periodically, whichever is appropriate given the circumstances of the release and the nature of cleanup activities. Oversight activities by Agency personnel may be supplemented through the use of contract resources such as TAT or TES. Contractors may assist Agency personnel in overseeing field activities and conducting technical review of work plans, protocols, site data, and reports.

When the PRP agrees to undertake response action, but monitoring by the OSC or CERCLA enforcement personnel shows that the actions are not timely or appropriate, EPA may either take action to enforce the AO by CERCLA section 106 judicial action or take over the response and pursue cost recovery.

Oversight Costs

Costs associated with oversight of PRP response actions, including removal actions, are fully recoverable under section 107 of CERCLA. To facilitate the preparation of potential future cost recovery actions against either PRPs conducting the removal or other non-participating PRPs, OSCs and RPMs should comply with the cost documentation procedures described in Chapter XII, Cost Recovery.

Recoverable costs include both intramural (e.g., EPA payroll and travel and indirect costs) and extramural (Agency contractors' costs) oversight costs. The Superfund Indirect Cost Manual for Cost Recovery Purposes FY 83 through FY 86 (March 1986) developed by the Superfund Accounting Branch, Financial Management Division provides an explanation of how EPA's extramural cost rates are developed and how those rates should be used to calculate extramural oversight costs for individual Superfund sites. Detailed information on cost recovery is located in Chapter XII, Cost Recovery. Information on cost management and recordkeeping is also in the Removal Cost Management Manual (April 1988).

F. Criminal Investigation

If at any time during removal actions criminal activity is suspected, the Special-Agent-In-Charge should be notified immediately to begin criminal investigative activities. In situations where a criminal investigation has been initiated by the NEIC, the OSC or RPM, Regional Counsel should exercise caution on becoming involved in a criminal investigation while conducting a PRP search, administrative or civil investigation. Additional information on criminal investigations and the role of the NEIC and Regional personnel is provided in the memorandum "Functions and General Operating Procedures for the Criminal Enforcement Program" (Courtney M. Price, January 7, 1985).

G. Community Relations

Community relations activities are ongoing throughout removal actions, varying in extent with the urgency of the situation. The objectives of community relations during removal actions include:

- To identify citizen leaders, public concerns, and a site's social and political history and encourage citizens to express concerns and provide information
- To take into account community, including PRP, views and concerns into the decision-making process
- To provide information to the community on the health and environmental effects of releases and proposed response action.

By providing information as directly and quickly as possible, the OSC will ensure that the community receives the information it needs about the response action and the effects of the release on the community's health and safety. OSWER Directive 9230.0-3B, the

Community Relations Handbook (June 1988) and Chapter 6 of the Community Relations Handbook, which was issued under separate cover as OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities" (November 6, 1988), should be consulted for current policy on community relations during removal actions. Regions are encouraged to consider use of the Regional Response Team (RRT) to assist in community relations activities.

Community Relations Plan

Under current requirements, a Community Relations Plan (CRP) should be prepared for all response actions lasting longer than 45 days. Before preparing a CRP, program and community relations staff must meet with local officials and interested citizens to obtain information about the site and to identify public concerns. The plan should provide:

- Site background
- The nature of the community concern
- The key site issues
- The objectives of the community relations activities
- Specific activities to be undertaken at the site.

Responsible parties may participate in implementing elements of the CRP at the direction of, and with oversight by, Regional staff. The lead agency develops the community relations plan.

Community Relations Activities

Specific types of community relations activities during removals are likely to include meeting with citizens in the community, responding to inquiries from the media, and providing local officials with site status information.

II. PLANNING AND REPORTING REQUIREMENTS

A. *Contractor Support*

Resources available to Regional personnel to conduct PRP searches include OSCs, the Technical Assistance Team (TAT) contract, the Technical Enforcement Support (TES) contract, civil investigators, enforcement project managers, and the NEIC. Regional personnel should evaluate the contracting support options for conducting effective and efficient PRP searches for removals, and incorporate contractor support into quarterly and annual budget planning procedures. When planning for this contracting support, keep in mind that resources may be constrained by contract capacity or other factors.

Regional experience has shown that the TAT is an efficient resource for gathering information regarding property owners and site operators because the TAT is already in the field responding to the removal situation. Some Regions have open-ended TES work assignments that allow for limited PRP research to be conducted while the official paperwork for the work assignment is being processed. This approach has proven effective for limited research but does not allow and should not be used for the identification of a large number of generators/transporters. Regional personnel should note that the capacity of the TES contract may not allow its use for all removal PRP searches because of PRP search activities for the remedial program. Generally, a standard work assignment is used for PRP search work beyond the initial TAT work.

B. *Information Management Systems*

EPA has established several distinct but interrelated systems for documenting and tracking removal activities from the initial notification of the release through the completion of the response. This section identifies the various planning and tracking systems and discusses their relevance to enforcement removals.

SCAP/SPMS

Removals are tracked by SCAP/SPMS through the Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS). Exhibit II-5 summarizes SCAP/SPMS measures relevant to removals. OSCs should coordinate with their information managers to ensure that they are entering information into CERCLIS correctly. Exhibit II-6 is an example of a completed CERCLIS site information form (SIF) for a removal. OSCs should complete the SIF using the example outline of fields and values:

A. Operable Unit (Removals always have an operable unit of 00. All post-SARA removals must be coded 'RV' as an event.)
B. Event (RV = Removal)
C. Lead (RP = Responsible Party, F = Fund)
D. Plan start/complete date (FYQ)
E. Actual start/complete date (MM/DD/YY)
F. SPMS Target (P = Primary, A = Alternate, once a removal has started, it cannot be coded as an 'A')
G. SCAP Note (Information about the removal)
H. Takeover Flag (See below)
I. First Start/Complete Indicator
J. Event Start NPL Status (Y/N)

Exhibit II-5

SCAP/SPMS Targets and Measures for Removals

Targets

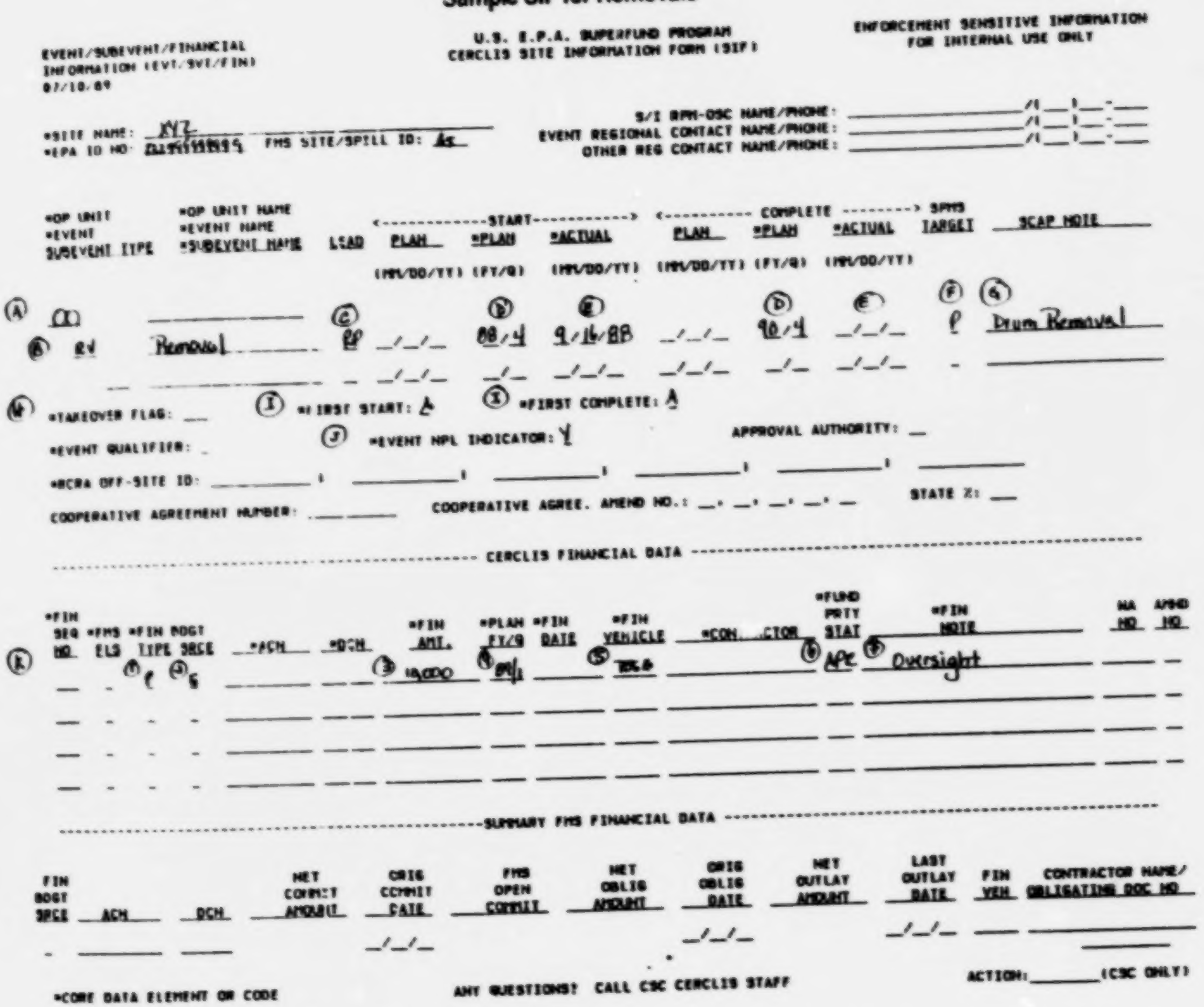
ACTIVITIES	SPMS TARGET	SCAP TARGET	QUARTERLY TARGET	ANNUAL TARGET
Removal				
NPL Removal Start		X		X
Non-NPL Removal Start		X		X
NPL Site Completions through Removal Actions		X	X	
Remedial/Removal				
NPL Sites Addressed through removal action or RI/FS start (S/C-2)	X		X	X
NPL Sites where all remedial/removal implementation has been completed (S/C-6)	X		X	X

Measures

ACTIVITIES	SPMS REPORTING	SCAP PLAN/REPORT	QTRLY	ANNUAL
Removal Completions				
Removal Investigations Completed at NPL Sites		X		X
Removal Completions		X		X
Remedial/Removal				
Percent of NPL Sites Addressed to date (S/C 2a)	X		X	X

EXHIBIT II-6

Sample SIF for Removals



EVENT/SUBEVENT/FINANCIAL
INFORMATION (EVT/SVT/FIN)
07/10/89

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS SITE INFORMATION FORM (SIF)

ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
*EPA ID NO: [illegible] FMS SITE/SPILL ID: As

S/I RPM-OSC NAME/PHONE: ______/(___)___-____
EVENT REGIONAL CONTACT NAME/PHONE: ______/(___)___-____
OTHER REG CONTACT NAME/PHONE: ______/(___)___-____

*OP UNIT *EVENT SUBEVENT TYPE	*OP UNIT NAME *EVENT NAME *SUBEVENT NAME	LEAD	START PLAN (MM/DD/YY)	START *PLAN (FY/Q)	START *ACTUAL (MM/DD/YY)	COMPLETE PLAN (MM/DD/YY)	COMPLETE *PLAN (FY/Q)	COMPLETE *ACTUAL (MM/DD/YY)	SPMS TARGET	SCAP NOTE
Ⓐ CO									ⓕ	Ⓖ
Ⓑ RV	Removal	Ⓒ RP	_/_/_	Ⓓ 88/4	Ⓔ 9/16/88	_/_/_	Ⓓ 90/4	Ⓔ _/_/_	P	Drum Removal
__		_	_/_/_	_/_	_/_/_	_/_/_	_/_	_/_/_	-	

Ⓗ *TAKEOVER FLAG: __ Ⓘ *FIRST START: A Ⓘ *FIRST COMPLETE: A

*EVENT QUALIFIER: _ Ⓙ *EVENT NPL INDICATOR: Y APPROVAL AUTHORITY: _

*RCRA OFF-SITE ID: ______, ______, ______, ______, ______, ______

COOPERATIVE AGREEMENT NUMBER: ______ COOPERATIVE AGREE. AMEND NO.: _, _, _, _, _ STATE %: __

---------- CERCLIS FINANCIAL DATA ----------

	*FIN SEQ NO	*FMS ELS	*FIN TYPE	BDGT SRCE	*ACN	*DCN	*FIN AMT.	*PLAN FY/Q	*FIN DATE	*FIN VEHICLE	*CONTRACTOR	*FUND PRTY STAT	*FIN NOTE	NA NO	AMND NO
Ⓚ	__	-	① C	② S			③ 10,000	④ 89/1		⑤ [illegible]		⑥ APC	⑦ Oversight		
	__	-	-	-											
	__	-	-	-											
	__	-	-	-											
	__	-	-	-											

---------- SUMMARY FMS FINANCIAL DATA ----------

FIN BDGT SRCE	ACN	DCN	NET COMMIT AMOUNT	ORIG COMMIT DATE	FMS OPEN COMMIT	NET OBLIG AMOUNT	ORIG OBLIG DATE	NET OUTLAY AMOUNT	LAST OUTLAY DATE	FIN VEH	CONTRACTOR NAME/ OBLIGATING DOC NO
-				_/_/_			_/_/_		_/_/_		

*CORE DATA ELEMENT OR CODE ANY QUESTIONS? CALL CSC CERCLIS STAFF ACTION: ______ (CSC ONLY)

* NOTE This exhibit presents page one of the SIF The actual SIF includes a second page for additional comments

K. Financial Requirements:

1. Financial Type (P = Planned Obligation)
2. Budget Source (E = Enforcement)
3. Financial Amount (Required for oversight)
4. Plan/Actual Financial Date (FYQ, MM/DD/YY)
5. Financial Vehicle (TES = Technical Enforcement Support)
6. Fund Priority Status (APR = Approved, ALT = Alternate).
7. Financial Note

A removal start date is the date the PRP/contractor/OSC begin actual on-site work (as entered in CERCLIS).

For Fund-financed removals, completions are counted on the day the contractor/OSC have demobilized and left the site. For PRP-financed removals, completions count when the Region has certified (via CERCLIS) that the PRPs or their contractors have completed a removal action and fully met the terms of the AO, CD or judgment.

The takeover flag is an indicator that identifies events that have had a change in lead. The valid codes are: T = Takeover, TT = Takeover of a takeover, or EV# = An event code (C2111) followed by a sequence number to indicate which event was taken over that created the new event record.

ERNS

The Emergency Response Notification System (ERNS) is a nationwide, centralized database supported by EPA, the U.S. Coast Guard (USCG) and the Department of Transportation (DOT) and maintained by the Transportation Systems Center (TSC). This information-sharing network documents every release notification received by the National Response Center (NRC), EPA Headquarters and Regional offices, and USCG.

ERNS is a documenting system, not a tracking system. Only the initial notification of release is documented, not the actions performed on the site. ERNS contains information on every reported release (including releases of non-hazardous substances and releases below RQ levels), not only those that result in removal action. ERNS also provides assistance to Regional enforcement personnel in supporting day-to-day response operations and enforcing release reporting requirements.

Notification System Process

Exhibit II-7 provides a diagrammatic representation of the ERNS release notification process. Responsible parties, private citizens, or State or local officials may report a release to the NRC. The NRC documents the notification and relays the data to the appropriate OSC for review and response determination. In the event that EPA or USCG is the first to be notified, the notified agency will document the release incident data and relay the information to the appropriate OSC for response determination. When the EPA Region is the notified agency, the release data must be transferred within two weeks of receipt to the TSC for compilation and input into the NRC database.

EPA Regional ERNS Responsibilities

EPA Regions and USCG field offices are responsible for:

- Taking calls from parties or NRC reporting oil spills or chemical releases
- Documenting the notification using standard data collection form
- Making response determination
- Relaying the release notification report within two weeks of receipt to the TSC.

These responsibilities ensure the efficient functioning of ERNS.

EPA Headquarters Responsibilities

EPA Headquarters, in conjunction with USCG and DOT, are responsible for providing overall direction and guidance for the development and operation of ERNS.

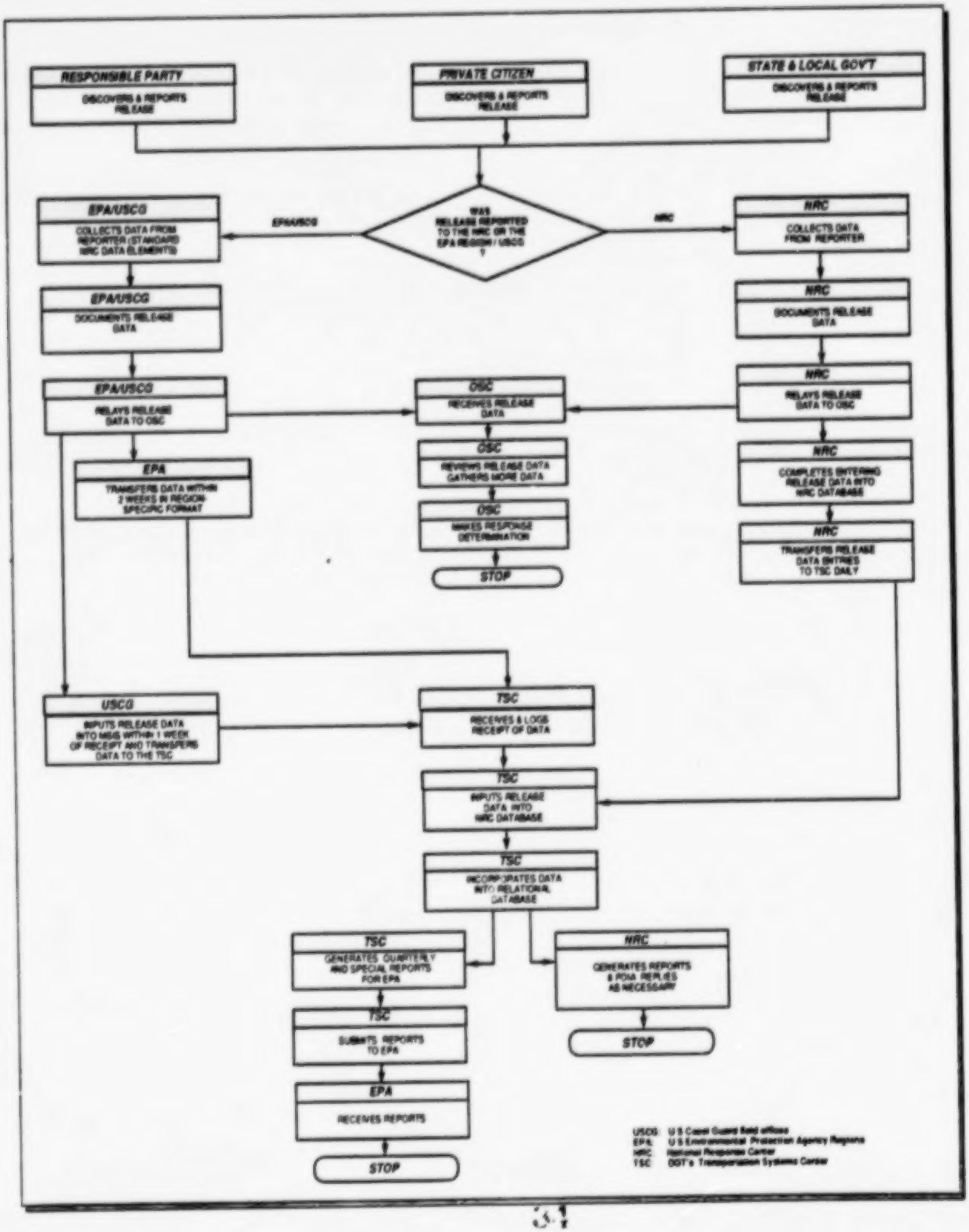
ERNS Phase II

ERNS has been fully operational since October 1987. As of January 1989, a second phase of ERNS became operational. Phase II verifies notification data and provides a direct link to CERCLIS.

IFMS The Integrated Financial Management System (IFMS) is a computerized database which tracks costs associated with removal actions. Costs are categorized by site and type of activity (e.g., oversight costs). OSCs and RPMs should use the IFMS to help monitor costs at their site, especially if accumulated costs approach the $2 million limit on removal expenditures set by CERCLA.

EXHIBIT II-7

ERNS Notification Process


RESPONSIBLE PARTY
DISCOVERS & REPORTS RELEASE
PRIVATE CITIZEN
DISCOVERS & REPORTS RELEASE
STATE & LOCAL GOV'T
DISCOVERS & REPORTS RELEASE
WAS RELEASE REPORTED TO THE NRC OR THE EPA REGION / USCG ?
EPA/USCG
NRC
EPA/USCG
COLLECTS DATA FROM REPORTER (STANDARD NRC DATA ELEMENTS)
EPA/USCG
DOCUMENTS RELEASE DATA
EPA/USCG
RELAYS RELEASE DATA TO OSC
EPA
TRANSFERS DATA WITHIN 2 WEEKS IN REGION-SPECIFIC FORMAT
NRC
COLLECTS DATA FROM REPORTER
NRC
DOCUMENTS RELEASE DATA
NRC
RELAYS RELEASE DATA TO OSC
NRC
COMPLETES ENTERING RELEASE DATA INTO NRC DATABASE
NRC
TRANSFERS RELEASE DATA ENTRIES TO TSC DAILY
OSC
RECEIVES RELEASE DATA
OSC
REVIEWS RELEASE DATA GATHERS MORE DATA
OSC
MAKES RESPONSE DETERMINATION
STOP
USCG
INPUTS RELEASE DATA INTO MSIS WITHIN 1 WEEK OF RECEIPT AND TRANSFERS DATA TO THE TSC
TSC
RECEIVES & LOGS RECEIPT OF DATA
TSC
INPUTS RELEASE DATA INTO NRC DATABASE
TSC
INCORPORATES DATA INTO RELATIONAL DATABASE
TSC
GENERATES QUARTERLY AND SPECIAL REPORTS FOR EPA
TSC
SUBMITS REPORTS TO EPA
EPA
RECEIVES REPORTS
STOP
NRC
GENERATES REPORTS & FOIA REPLIES AS NECESSARY
STOP
USCG U S Coast Guard field offices
EPA U S Environmental Protection Agency Regions
NRC National Response Center
TSC DOT's Transportation Systems Center

IV. POTENTIAL PROBLEMS/RESOLUTIONS

A. *Civil Investigator Support*

Many Regions have identified civil investigators as a timely mechanism for gathering PRP liability and financial information for removal cases, and noted that civil investigators are effective in a quality assurance capacity to oversee research being conducted by enforcement project managers.

Region III has recognized the need for a civil investigator to work exclusively on removal cases, and has a full time civil investigator position to work in the field in the early stages of a case. Regions with removal programs large enough to sustain one civil investigator full time should investigate the possibility of creating such a position. This position allows the investigator to become familiar with the types of investigative situations that removals present, and prevents conflicts in which priority is required by remedial cases. Additionally, assigning a civil investigator exclusively to removal cases ensures the investigator's availability to conduct PRP research when required immediately for a time-critical removal.

B. *Determining PRP Financial Viability*

Effective PRP searches should yield financial information on PRPs so that the determination can be made whether to pursue the CERCLA section 106 administrative order option. To ensure PRP searches yield the necessary financial information, Region IX includes a financial disclosure form with information request letters issued under section 104 (e) of CERCLA. Standard PRP search procedures in many Regions include a Dun and Bradstreet system financial report, and review of records for bankruptcy, property ownership, and financial status information.

C. *Use of Information Request Letters*

The 104(e) information request letter provides a means of gathering PRP liability and financial evidence, including information on site history, the identity of additional PRPs, and financial information. Financial information is necessary in determining whether to issue an administrative order. Therefore, enforcement personnel should be involved in removal cases at the outset to facilitate gathering as much information as possible before issuance of an administrative order. Section 104 (e) letters also may be used in conjunction with demand letters, issued approximately 12 months after removal completion during the cost recovery stage, to gather additional evidence and identify additional PRPs.

V. REFERENCES

Guidance

OSWER Directive No. 9836.0-1A, "Community Relations During Enforcement Activities" (November 6, 1988).

Courtney Price, "Functions and General Operating Procedures for the Criminal Enforcement Program" (January 7, 1985).

OSWER Directive No. 9833.3A, "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989).

OSWER Directive No. 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).

OSWER Directive No. 9834.10A, "Model Notice Letters" (February 7, 1989).

Lee Thomas, "Issuance of Administrative Orders for Immediate Removal Actions" (February 21, 1984).

Courtney Price, Lee Thomas, "Use and Issuance of Administrative Orders Under Section 106(a) of CERCLA" (September 8, 1983).

OECM/OWPE, "Guidance on CERCLA Section 106(a) Administrative Orders" (To Be Issued).

Manuals

OSWER Directive 9230.0-3B, Community Relations Handbook (November 1988).

OSWER Directive 9834.6, Potentially Responsible Party Search Manual (August 27, 1987).

OSWER Directive 9360.0-02B, Removal Cost Management Manual (April 1988).

Office of the Comptroller, Superfund Indirect Cost Manual for Cost Recovery Purposes FY 83 Through FY 86 (March 1986).

OSWER Directive 9360.0-033, Superfund Removal Procedures, Revision Number Three (February 1988).

OSWER Directive 9200.3-01A, SCAP Manual (updated annually).

COMPREHENSIVE SITE PLANNING

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
Objectives of Site Management Planning 1
    Roadmap for Site Activities 1
    Role Definitions 1
    Activity Timelines 1
    Accountability Framework 1
    Team Commitments to Objectives 2

II. PROCEDURES AND INTERACTIONS 3

A. Develop Initial SMP 3
B. Develop Detailed Plans 3
C. Site Management Plan Outlines 3
    Contents of the Overview Component 3
        Site Team and Major PRP Representatives 4
        Remedial and Enforcement History 4
        Remedial and Enforcement Objectives 4
        Schedule of Major Activities 5
    Contents of Detailed Plans 5
        PRP Search Plan 5
        Remedy Selection and Negotiation Plan 6
        Site Litigation Management Plan 7
    Review and Approval of SMPs 8

III. PLANNING AND REPORTING REQUIREMENTS 9

A. Planning Reflected in SCAP/ SPMS 9
B. Budget Projections Based on Schedule and Classification 9

IV. POTENTIAL PROBLEMS/RESOLUTIONS 10

A. Overly-Optimistic Forecasts 10
B. Realistic Division of Operable Units 10

V. REFERENCES 11

Guidance 11
Manual 11
Memorandum 11

APPENDIX

COMPREHENSIVE SITE PLANNING

I. DESCRIPTION OF ACTIVITY

Introduction

Comprehensive site planning is an ongoing process of developing and refining an overall strategy to integrate the remedial and enforcement activities at a site. It is a critical element in the effective management of Superfund sites.

Objectives of Site Management Planning

EPA or the State should develop a Site Management Plan (SMP). The following material sets out conceptually what each site management plan should strive to achieve. Although this material will not appear as presented below in a SMP, each SMP should accomplish the objectives expressed below. Outlines and discussions of specific content in the SMP begin on page three of this chapter.

Roadmap for Site Activities

For most Superfund sites, it is critical to establish an overall plan which integrates the enforcement and response activities at the site and coordinates these activities in pursuit of the specific site objectives. The SMP should provide such a roadmap, including general site objectives and strategy.

Role Definitions

The SMP should define the roles and responsibilities of individual site team members. These definitions should clearly communicate how each participant's activities and deliverables contribute to the progress of the site strategy and should provide a structure within which steady manageable progress can be made toward case objectives.

Activity Timelines

Careful planning of timelines is especially necessary to successfully integrate enforcement activities and response activities since major enforcement and response milestones characteristically have very long lead times. To coordinate enforcement and response timelines, advance planning must be based on a clear understanding of the projected time requirements of each type of activity and a clear understanding of the interdependencies of the various enforcement and response activities.

For example, to promote PRP agreements to undertake response actions, general notice letters should be issued well in advance of RI/FS special notice letters. Moreover, to promote an RD/RA settlement, EPA needs to provide the PRPs with the draft feasibility study as soon as EPA approves it, updated PRP information as provided by the special notice provision, past cost information, a draft consent decree, and a negotiation schedule set by special notice. The preparation of these materials needs considerable lead time. To avoid delays in the overall project schedule, the lead activities for all of these milestones should be carefully planned out. All participants in these lead activities must be directing their efforts to complete them in a timely, coordinated manner so that later case activities dependent upon their completion are not delayed.

Accountability Framework

Individuals should be held accountable for their specific assigned responsibilities for component activities. This should include the responsibility for coordinating other team members' activities that are necessary to perform the component in question.

Team Commitments to Objectives

Because so many different participants are involved in moving Superfund cases and decision-making to successful conclusions, it is important to be sure that all participants are committed to common (or at least consistent) objectives for the site. To avoid last minute vetoes of site activities, this commitment should be obtained early in the site development process; it should be ratified at high levels of management in all involved offices; and it should be reaffirmed frequently, especially if site objectives undergo revisions as site awareness and strategy develop.

II. PROCEDURES AND INTERACTIONS

A. *Develop Initial SMP*

It is important to maintain a general roadmap to site activities to assure a coherent context for planning and conducting the specific site activities. The SMP evolves over time and becomes more precise as the site passes through four different phases. The initial plan should be developed when the site team is first assigned to the site. The initial plan should be keyed into the long-term strategy as set forth by the Regional SCAP and should be consistent with the quarterly targets contained in the SCAP. The flowchart in Exhibit III-1 presents the Region I view of the timeline for a typical Superfund site. This timeline provides the basis for site teams to know when to initiate the various pieces of the site management planning process. It is important that the timeline contain as much detail as possible and that the site team adhere to it.

B. *Develop Detailed Plans*

At four key points in the Superfund process, more detailed plans should be developed and approved by team members. The specific plans are intended to perform the same functions as the overall roadmap -- integrating enforcement and response planning in pursuit of clearly articulated case objectives, defining roles and responsibilities of site team members, establishing a framework for accountability for the specific activities, and obtaining commitments of all participants to the objectives, activities and schedules. The specific activity-oriented detailed plans are:

- PRP Search Plan
- RI/FS Negotiation Plan
- RD/RA Selection and Negotiation Plan, including Pre-Negotiation Mini-Litigation Report
- Litigation Management Plan.

C. *Site Management Plan Outlines*

The following pages contain a brief discussion of the contents of the general information and objectives overview component of the SMP. This discussion is followed by outlines of the four detailed plans: PRP Search Plan, the RI/FS Negotiation Plan, the RD/RA Selection and Negotiation Plan, and the Site Litigation Management Plan. The section concludes by addressing the review and approval of SMPs.

Contents of the Overview Component

Each SMP should have a general information and objectives component, the overview, which is updated with current information at least as often as each new detailed plan is prepared. At each point where a major change or addition is made to the overview or to the detailed site plans, the items in the case overview should be reviewed, revised as necessary, and included as part of the current SMP. A sample of the overview component of the SMP is included as an appendix to this chapter. In general, the overview provides the following:

Site Team and Major Potentially Responsible Party (PRP) Representatives

Site team members should be identified as early as possible. Site team members should include the RPM, the Office of Regional Counsel (ORC) attorney, and, as appropriate, representatives from the following offices: OWPE, OECM, DOJ, State Attorney General's office, State environmental agency office, and Federal and State natural resource trustee offices. The overview component should always include up-to-date telephone and "fax" numbers for each team member. For PRP representatives, including legal, contractor and group or committee members, their name, title, office and telephone number should be provided.

Remedial and Enforcement History

The description of the site history should provide a brief summary of the response and enforcement activities at the site. The level of detail should be sufficient to provide all relevant historical information necessary to allow site team members to adequately evaluate all current components of the SMP. The description should be updated in successive iterations of the SMP as necessary to meet this level of detail.

Remedial and Enforcement Objectives

The clear articulation of site objectives and the commitment of all site team members to the identified objectives are necessary cornerstones upon which a successful Superfund case can be built. It is crucial that all team members accurately convey their institutional objectives (which may not be shared by other team members) for each site so that all team members can focus their efforts on clearly identified consistent objectives. Overall site objectives can be expressed through:

- Identification of major response action objectives based on present assessment of site environmental conditions (e.g., planning to assure response actions appropriate to the degree of knowledge about and urgency of site conditions)

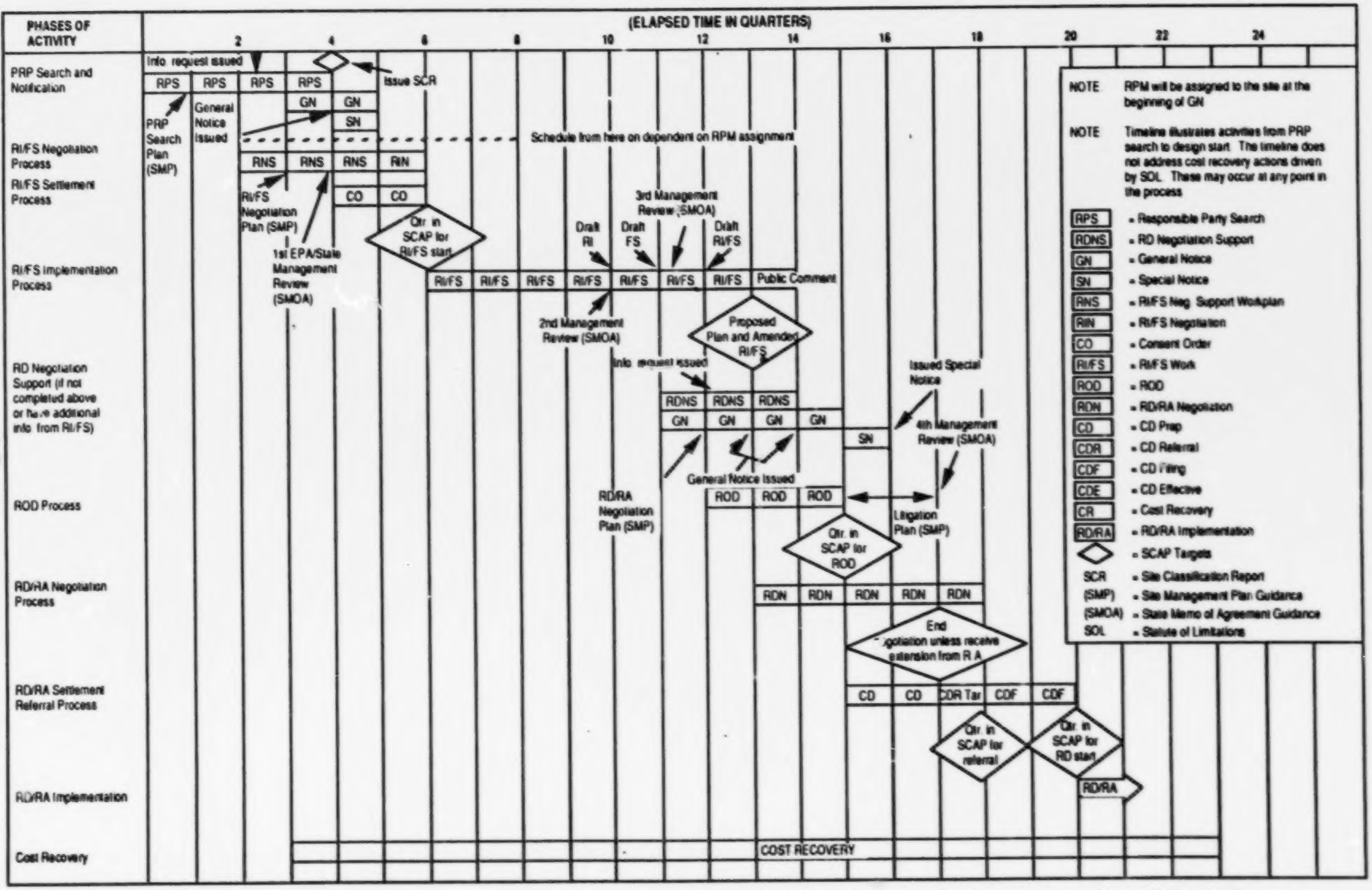
- Identification of programmatic and legal objectives of enforcement negotiations and actions (e.g., use of favorable factual context to establish legal precedent or early pre-litigation settlement to avoid exceedingly complex and costly litigation)

- Discussion of relationship between remedial objectives and enforcement objectives (e.g., desire to establish litigation precedent may or may not be consistent with the degree of need for early environmental response at the site)

- Discussion of whether the site is a 10 percent or 50 percent site with regard to the State contribution needed for the RA and whether the State will have this cost share available for the site.

Exhibit III-1

Overview Flowchart of CERCLA Enforcement and Remedial Process
Timeline for Region I Enforcement and Remedial Process


PHASES OF ACTIVITY
(ELAPSED TIME IN QUARTERS)
2
4
6
8
10
12
14
16
18
20
22
24
PRP Search and Notification
RI/FS Negotiation Process
RI/FS Settlement Process
RI/FS Implementation Process
RD Negotiation Support (if not completed above or have additional info. from RI/FS)
ROD Process
RD/RA Negotiation Process
RD/RA Settlement Referral Process
RD/RA Implementation
Cost Recovery
Info. request issued
RPS
PRP Search Plan (SMP)
General Notice Issued
GN
SN
Issue SCR
Schedule from here on dependent on RPM assignment
RNS
RIN
RI/FS Negotiation Plan (SMP)
1st EPA/State Management Review (SMOA)
CO
Qtr. in SCAP for RI/FS start
RI/FS
Draft RI
Draft FS
3rd Management Review (SMOA)
Draft RI/FS
Public Comment
2nd Management Review (SMOA)
Proposed Plan and Amended RI/FS
Info. request issued
RDNS
General Notice Issued
Issued Special Notice
4th Management Review (SMOA)
RD/RA Negotiation Plan (SMP)
ROD
Litigation Plan (SMP)
Qtr. in SCAP for ROD
RDN
End negotiation unless receive extension from R.A.
CD
CDR Tar
CDF
Qtr. in SCAP for referral
Qtr. in SCAP for RD start
RD/RA
COST RECOVERY
NOTE RPM will be assigned to the site at the beginning of GN
NOTE Timeline illustrates activities from PRP search to design start. The timeline does not address cost recovery actions driven by SOL. These may occur at any point in the process
RPS = Responsible Party Search
RDNS = RD Negotiation Support
GN = General Notice
SN = Special Notice
RNS = RI/FS Neg. Support Workplan
RIN = RI/FS Negotiation
CO = Consent Order
RI/FS = RI/FS Work
ROD = ROD
RDN = RD/RA Negotiation
CD = CD Prep
CDR = CD Referral
CDF = CD Filing
CDE = CD Effective
CR = Cost Recovery
RD/RA = RD/RA Implementation
◇ = SCAP Targets
SCR = Site Classification Report
(SMP) = Site Management Plan Guidance
(SMOA) = State Memo of Agreement Guidance
SOL = Statute of Limitations

The purpose of this flowchart is to provide an overview of the major remedial and enforcement activities required to perform a Superfund cleanup action under CERCLA. In the remainder of this notebook, each of these activities is described in more detail.

Schedule of Major Activities

It is important to describe an overall blueprint for the major activities necessary to meet the site objectives in order to establish and maintain, among the site team members, a shared view of the "big picture" throughout the case. The major activities include primarily items which are SCAP commitments or major enforcement targets in current years or in out-years, e.g. ROD commitments or cost recovery deadlines. This blueprint may change over time and it should be updated whenever major changes occur.

The flowchart in Exhibit III-2 is an example of the level of specificity appropriate for the general timeline for a site management plan. Critical points where the timeliness of enforcement actions could affect response activity should be indicated on the timeline.

Contents of Detailed Plans

Following are outlines of the contents of the PRP Search Plan, RI/FS Negotiation Plan, RD/RA Selection and Negotiation Plan, and Site Litigation Management Plan. These outlines represent the level of detail that should be appropriate for the majority of sites. Expanded outlines for complex situations or sites are being revised by the Office of Waste Programs Enforcement (OWPE).

PRP Search Plan

1. PRP Search Planning and Initial Strategy

   a. Identify contractor and staff resource needs
   b. Summarize team roles and responsibilities for managing and performing PRP search tasks
   c. Discuss the schedule of the PRP search in relation to the overall site timeline.

2. Initial Assessment and PRP Search

   a. Summarize information collected to date
   b. Develop strategy for collecting and using information

      - Develop PRP correspondence tracking system and evidence files
      - Follow-up on recipients who fail to fully respond

   c. Conduct initial search, including; title search and interviews with Federal, State and local government officials. (The usual focus is first on owners and operators and then generators and transporters.)

3. Interim Assessment

   a. Conduct analysis, identify issues and project follow-up and additional PRP search needs, including unique strategies

    b. Ensure information regarding PRP liability is well documented
    c. Describe steps for PRP notification and information exchange
    d. Develop a PRP list, including names and addresses.

4. Conclusion of PRP Search

    a. Indicate actions to enhance inter-PRP and PRP/government relations, such as: encouraging PRPs to form a steering committee, providing information to PRPs and encouraging PRPs to use a facilitator to resolve disagreements
    b. Assess ability to develop volumetric rankings and NBARs
    c. Complete information collection (including use of subpeonas), distribution of information (to include Administrative Record coordinator and community relations coordinator), documentation of evidence and notification (including special notice).

Remedy Selection and Negotiation Plan

1. Schedule and Staffing Requirements

    a. Provide a schedule for completing the negotiations (including activities, staff and contractor support)
    b. Describe coordination with State and other government offices.

2. Negotiation Objectives

    a. Develop initial and bottom-line negotiation positions
    b. Assess the desirability of a PRP RI/FS relative to site and PRP history to date
    c. Identify potential for alternative settlements, including mixed funding, de minimis or partial settlements (usually for RD/RA).

3. Costs Incurred and Cost Recovery Plan

    a. Summarize costs incurred to date and estimate future response costs at the site
    b. Develop negotiation strategy for cost recovery, including the degree of compromise available on past and oversight costs and the linkage between recovery of past and oversight costs and PRP performance
    c. Describe the methods used to document costs for the site and identify sources for cost documentation requests
    d. Assess timing of demand, considering statute of limitations, etc.

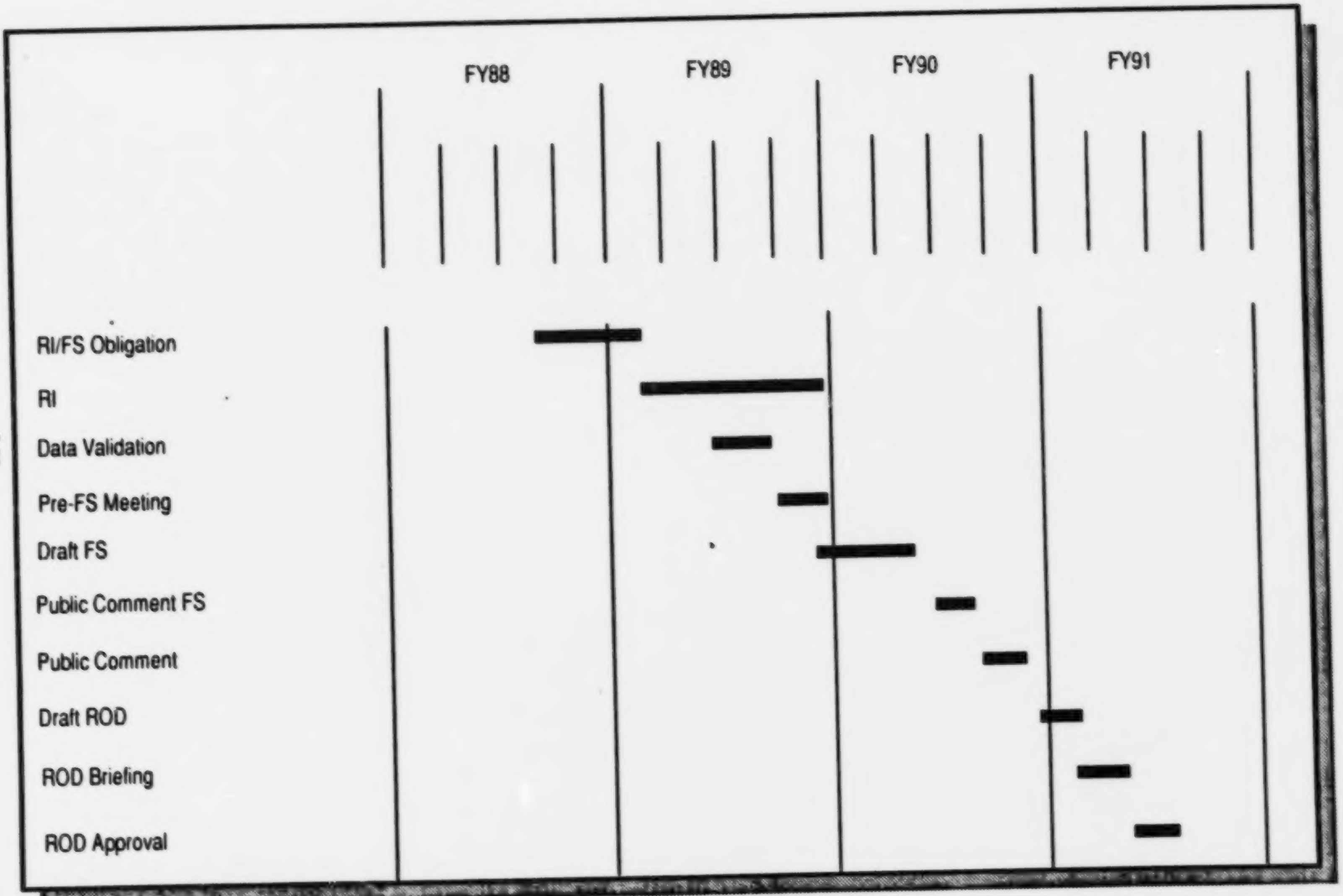
4. Remedy Selection Process

    a. Discuss the methodology used in selecting a site remedy (identifying participants in RI/FS review; ROD preparation; PRP and public

11

Exhibit III-2

Sample Portion of Site Timeline*



* This example covers only a specific point in the process on the overall site timeline

participation in the process; and compilation, reviewing, updating and certification of the Administrative Record)
b. Indicate how remedy selection affects the RD/RA negotiation process.

5. Criteria For Good Faith Offer

a. Include PRPs willingness to conduct or finance site clean-up activities and reimburse EPA for oversight activities, response to EPA's statement of work, demonstration of PRP capabilities, etc.

6. Enforcement Prerequisites

a. Discuss the progress made in identifying PRPs and PRP willingness to cooperate with the government
b. Assess enforcement potential including determination of imminent and substantial endangerment, strength of evidence/liability, financial viability of PRPs, etc.
c. Assess use of enforcement tools including special notice, unilateral actions, actions against recalcitrants, etc.

7. Technical Requirements For PRP Performance

a. Develop scope of work or work plan
b. Describe key items required to conduct PRP oversight
c. Assess the site access situation.

8. Draft Administrative Order (AO) or Consent Decree (CD), as appropriate

__Site Litigation Management Plan__

(This plan should be prepared in close coordination with the Department of Justice and should incorporate other guidance, as appropriate, including the Model Litigation Report, Negotiations Checklist and Pre-Referral Negotiations Procedures.)

1. Litigation Schedule and Staffing Requirements

a. Provide a schedule for completing litigation activities (including activities, staff and contractor support)
b. Summarize the specific team responsibilities for managing and performing litigation, along with dates for starts and completions
c. Assess enforcement progress to date in the litigation plan.

2. Objectives of Litigation

a. Discuss litigation objectives set by the site team and the reasons for their selection

b. Identify the potential alternatives (e.g., return to negotiation posture or different legal options to achieve litigation objectives).

3. Litigation Strategy

a. Identify the initial and bottom-line litigation points in the plan and reasons for the positions.

Review and Approval of SMPs

The original SMP and all of its revisions and specific plans should be reviewed and concurred on by all team members. It is intended to be the primary vehicle for obtaining management concurrence on case objectives and strategy. Therefore, team members must be certain to obtain sufficient management review and approval to assure concurrence by their management. Site teams thereby should be empowered to operate within the contours of approved SMPs with the expectation of complete management support for all details of the plan unless the facts or policies underlying such support change materially.

Each Region must develop a management review and concurrence process that is appropriate to its organizational structure and lines of authority. The involvement of Headquarters and DOJ should be built into the Regional process in accordance with the operative delegations or case-specific agreements.

III. PLANNING AND REPORTING REQUIREMENTS

A. Planning Reflected in SCAP/ SPMS

Comprehensive site planning and the SCAP/SPMS process serve a common purpose. Both ensure a steady flow of sites through the response process. Therefore, it is essential that the site planning process be merged with the yearly Superfund planning process. For detailed information on the SCAP planning process, use the annual SCAP manual.

B. Budget Projections Based on Schedule and Classification

RPMs are responsible for keeping data on the project up-to-date. Without accurate and current data, the Agency's planning tools will not work effectively. The RPM has the responsibility of providing accurate site information for CERCLIS. This data should be updated monthly. Exhibit III-3 is an example of a completed CERCLIS Site Information Form (SIF) for site/incident planning. RPMs should complete the SIF using the following sample outline of fields:

A. Site Name
B. EPA ID Number
C. FMS Site/Spill Number
D. Alias Name
E. Street
F. City
G. County
H. State
I. Zip Code
J. LL Source
K. Federal Facility
L. Fed-Agency-PRP-Flag
M. State-PRP-Flag
N. PRP Agency Code
O. Site Name Source
P. Municipal-PRP-Flag
Q. Site/Incident Abstract
R. Site Classification (FE = Federal Enforcement -- all Federal facilities should be coded with an FE-lead. Otherwise, the code is entered after the completion of the PRP Search.)
S. NPL/Status Indicator
T. Proposed NPL Update Number
U. Site Category
V. Ownership Indicator
W. Incident Type (if applicable).

Exhibit III-3(1)

Sample SIF for Site Planning

SITE/INCIDENT FORM 1 (SI1)
07/10/89

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS SITE INFORMATION FORM (SIF)

ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

Ⓐ *SITE NAME: XYZ
Ⓑ *EPA ID NO: ZZ2999999999 Ⓒ ENS SITE/SPILL ID: AS

S/I RPM-OSC NAME/PHONE: ________/(___)___-____
OTHER REG CONTACT NAME/PHONE: ________/(___)___-____

Ⓓ ALIAS NAME(S): ABC,
PDQ,
________,

Ⓔ *STREET: Main Street
Ⓕ *CITY: Little Town
Ⓖ *COUNTY: Hobbes
Ⓗ *STATE: ZZ
Ⓘ *ZIP: 00000

*LATITUDE: __/__/__.__
*LONGITUDE: ___/__/__.__
Ⓙ *LL SOURCE: B
*LL ACCURACY: _

CONGRESSIONAL DISTRICT: _
*COUNTY CODE: __
*SMSA: ___
USGS HYDRO UNIT: ________
Ⓛ FED-AGENCY-PRP-FLG: Y
Ⓜ STATE-PRP-FLAG: N
Ⓝ PRP AGENCY CODE: DOE, ___, ___, ___, ___, ___.

Ⓚ *FED. FACILITY FLAG: Y
*RCRA FACILITY FLAG: _
NO FURTHER ACTION FLAG: _
DIOXIN TIER: ________
Ⓞ SITE NAME SOURCE: E
Ⓟ MUNICIPAL-PRP-FLAG: N

AGGREGATE CASE BUDGET OBLIGATIONS: ________
AGGREGATE FUND OBLIGATIONS: TBD

Ⓠ *SITE/INCIDENT ABSTRACT: ________

Ⓡ *SITE CLASSIFICATION: EE

(NG) FUND LEAD/NEGOT
(FE) FEDERAL ENFORCEMENT

(F) FUND LEAD/NO NEGOT
(ND) NO DETERMINATION(DEFAULT)

(SE) STATE ENFORCEMENT

*CORE DATA ELEMENT OR CODE

ANY QUESTIONS? CALL CSC CERCLIS STAFF

ACTION:______(CSC ONLY)

Exhibit III-3(2)

Sample SIF for Site Planning

SITE/INCIDENT FORM 2 (SI2)
07/10/89

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS SITE INFORMATION FORM (SIF)

ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
*EPA ID NO: [illegible] FMS SITE/SPILL ID: AS

S/I RPM-OSC NAME/PHONE: ______________/(___)___-____
OTHER REG CONTACT NAME/PHONE: ______________/(___)___-____

Ⓢ *ENTRY NPL/STATUS INDICATOR: F

(S) PRE-PROPOSAL TO NPL
(P) SITE CURRENTLY PROPOSED FOR THE NPL
(R) SITE REMOVED FROM THE PROPOSED NPL
(F) SITE CURRENTLY ON THE NPL

Ⓣ *PROPOSED NPL UPDATE NO: __

*FINAL NPL UPDATE NO: __

(D) SITE DELETED FROM NPL
(N) SITE IS NOT CURRENTLY NOR WAS FORMERLY ON THE PROPOSED OR FINAL NPL
(O) NON.SITE: A SITE/INCIDENT WHICH WILL NOT COUNT IN THE INVENTORY OR IN STATISTICAL REPORTS

Ⓤ *SITE CATEGORY: M

(A) ABANDONED
(D) DIOXIN
(H) HOUSING AREA/FARM
(L) LANDFILL
(O) OTHER
(T) MINES/TAILING

(B) CHEM. PLANT/IND REF
(F) FEDERAL FACILITY
(I) IND. WASTE TREATMENT
(M) MANUFACTURING PLANT
(P) PURE LAGOONS
(V) WATERWAYS/CREEKS/RIVERS

(C) CITY CONTAMINATION
(G) GROUND WATER
(J) INORGANIC WASTE
(N) MILITARY RELATED
(R) RADIOACTIVE SITE
(W) WELLS

Ⓥ *OWNERSHIP INDICATOR: FF

(PR) PRIVATELY OWNED
(FF) FED. OWNED
(ST) STATE OWNED

(CO) COUNTY OWNED
(DI) DISTRICT OWNED
(MN) MUNICIPALITY OWNED

(IL) INDIAN LANDS
(MX) MIXED OWNERSHIP
(OH) OTHER
(UN) UNKNOWN

Ⓦ *INCIDENT TYPE: (FOR REMOVAL OSC'S ONLY) _

(O) OIL SPILL OCCURING AT A LOCATION NOT PREVIOUSLY IDENTIFIED AS A CERCLIS SITE
(N) SPILL (OTHER THAN OIL) OR OTHER REMOVAL AT A LOCATION NOT PREVIOUSLY IDENTIFIED AS ACERCLIS SITE

*CORE DATA ELEMENT OR CODE

ANY QUESTIONS? CALL CSC CERCLIS STAFF

ACTION:_______(CSC ONLY)

IV. POTENTIAL PROBLEMS/RESOLUTIONS

A. *Overly-Optimistic Forecasts*

RPMs should carefully scrutinize task completion forecasts to determine whether they realistically project future enforcement activity. Overly-optimistic forecasts may create expectations that cannot be met. As a consequence, the orderly flow of resources to the Region could be disrupted.

B. *Realistic Division of Operable Units*

The Agency bases its budget allocation on the number of operable units at a particular site. RPMs must carefully follow Agency guidance in identifying and reporting the number of operable units at the site.

V. REFERENCES

Guidance	Region V, "CERCLA Reauthorization Initiatives" (January 1987).
Manual	OSWER Directive 9355.1-1, Superfund Federal-Lead Remedial Project Management Handbook, Chapters 2 and 3 (December 1986). Region I, Enforcement and Remedial Activities Under SARA: A Training Manual, Chapter 1 (May 1989).
Memorandum	"Draft Transmittal of the Final Report and Work Products of the Superfund Enforcement Management Issues Work Group," Attachment 1, "Introduction to Site Management Planning," Bruce Diamond, Glenn Unterberger (January 5, 1989).

Appendix

APPENDIX

Site Management Plan Guidance
EXAMPLE SMP: Case Overview Component

EXAMPLES OF SITE MANAGEMENT PLANS

I. EXAMPLE SMP CASE OVERVIEW COMPONENT

What follows are examples from actual Site Management Plans. They were selected to give you examples of tasks that may need to be performed at your site. The examples are in a few different formats, site management teams should feel free to select or develop their own formats. The examples do not correlate directly with the Site Management Plan outline, where they do correlate with the outline there is an asterisk and site management plan outline sub-heading indicated.

*A. General Case Information.

*1. Site team identification, phone numbers and FAX numbers.

SITE TEAM MEMBERS

	Telephone number	Fax
Regional Site Manager:	Margaret Velie	(617) 573-9664 FTS
Regional Attorney:	Gregory M. Kennan	(617) 565-3443 FTS
Regional PRP Coord:	Barbara O'Toole	(617) 573-9690 FTS
Regional Pub.Aff.Coord.	Paul Knittel	(617)
State AG	Ken Tedford	
State Site Manager:	Ed Parker	
OECM Attorney	Carolyn Tillman	FTS 475-8205
DOJ Enforcement Atty:	Barbara A. Finamore	FTS 633-4112
DOJ Defense Atty:	Eileen McDonough	FTS 786-4785
Natural Resource Trustees:		

*2. Description of Site History

SITE DESCRIPTION

The Charles George landfill is a 70 acre mixed municipal and industrial landfill located in Tyngsborough, Massachusetts, (population 7210) near the town of Lowell. The area is mixed residential and industrial.

The George family has owned the landfill since 1967, and accepted hazardous waste from 1973 through at least 1976. The site was closed per State order and listed on the final NPL in 1983. Removal actions, completed in 1983 and 1984 included partial site fencing and installation of a temporary above-ground water line to nearby condominiums.

The area is in a glacial outwash basin. Extensive fractured bedrock is found at 10-20' below grade. The landfill is approximately 10' deep in most areas.

Two RODs have been issued for the site. The first was issued in 1983 to select a new, permanent water supply for the condominiums located near the site. The condominium's wells had caused contaminated groundwater at the landfill to travel downward and southward to the condos. The wells were closed by the State in July 1982.

The second ROD in 1985 selected a full synthetic landfill cap and appurtenant systems for source control. An "offsite" RI/FS should be finalized in July 1988 followed by a ROD in September 1988 for remediation of collected leachate and contaminated groundwater, sediment and off-gas.

*B. Remedial and Enforcement Objectives for the Case

1. Remedial Response Objectives

A. Complete Second Operable Unit RI/FS to obtain a technical understanding of groundwater and leachate flow in the area.

B. Review results of second unit RI/FS to ensure cap remedial action (1st Operable Unit) is protective.

C. Insure use and evaluation of possible emergency (removal) actions at the site is done in a timely manner and well documented.

2. Enforcement objectives

A. Insure all potentially responsible parties are identified.

B. Insure all noticed PRPs are clearly documented and criteria for selecting PRPs is well documented and concurred by management.

C. Have timely and successful negotiations for remedy implementation

*C. Identification of Major Activities Necessary to Meet Programmatic, Legal and Enforcement Objectives

1. Remedial Activities

A. Implement the remedy for the Lagoons in a timely manner.

B. Complete the study of the Landfill, approve a ROD for it by the fourth-quarter 1989 and implement the remedy in a timely manner.

C. Complete one final study that encompasses the remaining potential problem areas of the site, make a comprehensive decision on their remediation and implement the remedy (s) in a timely manner.

D. Provide for the maintenance of the asbestos landfill.

E. Delist the site.

2. Enforcement Activities

A. Compel the PRPs to implement the lagoons cleanup.

B. Secure an agreement with responsible parties to maintain the asbestos landfill.

C. Compel the PRPs to implement remedial measures that we determine are necessary at the Landfill or at other portions of the site.

D. Recover our past-costs.

*D. General Timeline and General Assignments or Responsibility for Specific Activities

1. General Assignment of Responsibility

A. Remedial Activities

The RPM is actively working with CDM in the development of the FS. Upon receipt of the draft document, he will function as lead in coordinating EPA and MA DEQE comments. The RPM will also begin drafting the ROD as soon as the FS has been placed in final form.

B. Enforcement Activities

1. Responsible Party Coordinator (RPC)
The assigned RPC's primary task is to establish, in final form,

the PRP Volumetric Ranking List and Mailings List. In completing that task, the RPC has reviewed the PRP correspondence files and developed a PRP Tracking System, which consists of a summary sheet for each PRP with various pieces of information. The RPC will address a number of issues in developing the final list, including: the status of bankrupt companies; identification of PRPs that have been, or should be, released; and classification of PRPs as owner-operators, generators and transporters.

In addition, the RPC will oversee the performance of certain tasks by TES contractors, such as a title search and mass mailings to the PRPs. The RPC will also be obtaining cost documentation during the third quarter of FY 86, will ensure that all items on the checklist are obtained, and will serve as a notetaker and third party observer during negotiations.

2. Referral package

The RPM will be responsible for drafting the technical components of the referral package and working closely with the RPC to ensure that the cost documentation package and other Appendices are complete.

The ORC attorney will have responsibility for drafting the litigation report which will accompany the referral.

3. Negotiations

The RPM will take the lead in briefing the PRPs concerning technical issues. The ORC attorney will take the lead in any settlement discussions which might lead to a Consent Decree.

All negotiation sessions will be preceded by a coordination meeting with the State and DOJ at which ORC will present a draft agenda.

2. General Timeline

The Case Management Schedule (CMS) consists of both a remedial component and an enforcement component. The CMS functions as a tool for the project staff in three key areas: overall project management, the development of a Record of Decision (ROD), and the development of a CERCLA Section 107 Cost Recovery Referral Package. The project schedules are displayed on Task Table Reports and Gantt Charts. The tables include start and end dates for each activity as well as an assignment of responsibility for the performance of the task. The Gantt Chart visually depicts the start date of each activity and its duration. It also shows the critical path of the project.

A. Remedial Component

The initial task on the critical path towards the signing of a ROD by the Regional Administrator is the completion of a draft FS. The schedule completion date for the draft FS is May 26, 1988. Upon receipt of this document, the Project Development Procedures and ROD strategy as set out in a memo from Merrill S. Hohman dated December 23, 1987 will be followed. Based on these procedures, a target date of August 18, 1988 is proposed for the issuance of a Record of Decision for the site.

B. Enforcement Component

1. Cost Recovery Referral Package

The cost recovery referral package will be developed concurrent with the ROD. Based on a review of the document inventory/event chronology, EPA will assess the case and determine what claims a cost recovery referral should include.

After receipt of the final FS, an update of the cost recovery documentation will be requested from EPA Headquarters as well as the Region. An update is only necessary because an original request was made in January 1985. The process of compiling the supporting documentation from January 1985 to May 1988 should take approximately eight weeks. Upon receipt in the Region, all cost documentation should be collated and summarized in the referral package. The referral package will be completed prior to the end of FY 88.

C. Summary

The CMP for Blank, Inc. site presented previously is an ambitious but realistic project schedule for the issuance of a ROD and the preparation of a CERCLA 107 Cost Recovery Referral Package. The remedial schedule is a product of lengthy discussions with EPA's contractor. As long as adequate funding is provided to the project, a ROD is an attainable commitment for fourth quarter FY 88.

PRP SEARCH, NOTIFICATION, AND INFORMATION EXCHANGE

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
Objectives of PRP Searches 1
Liability 2
    Strict Liability 3
    Joint and Several Liability 3
    Limited Defenses Under CERCLA 3
General Approach to PRP Searches 4
    Baseline Search Tasks 4
    Specialized Search Tasks 5
    Managing the Search Process 6
PRP Search Reports 6
Key Players in the PRP Search Process 6
    RPMs 7
    Regional Attorneys 7
    Civil Investigators 8
    Contractors 8

II. PROCEDURES AND INTERACTIONS 10

A. Initiating a Preliminary PRP Search 10
B. Develop PRP Search Plan 10
C. Baseline Search 11
D. §104(e) Letters Issued to Owners/Operators and Follow-up 12
    Statutory Authority 13
    General Content of 104(e) Letters 13
    Insurance Information 15
    Written Response and Due Date 16
E. Compile, Organize, and Analyze 104(e) Letter Responses 16
    Responding to FOIA Requests 16
    Enforcement Strategy for Non-Compliance With Information Requests 17
        Administrative Order to Compel Compliance 17
        Judicial Action to Compel Compliance 17
F. Baseline Search Progress Review 18
G. Prepare Baseline Report 18
H. Management Review 19
I. 104(e) Letters to Generators and Transporters 19
J. Specialized Investigative Tasks 19
    Administrative Subpoena 19
K. Interim-Final Report 20
L. Interim Report Follow-up 20
M. General Notice Letters (GNLs) 21
N. Ongoing Information Exchange 23

III. PLANNING AND REPORTING REQUIREMENTS 24

A. Planning 24
B. Budget 24
C. Reporting Requirements 24

IV. POTENTIAL PROBLEMS/RESOLUTIONS 26

A. Timing 26
B. Clarifying Roles and Responsibilities 26
C. Resource Commitments 26
D. Examples of Enforcing Information Requests 27
The Cannons Sites 27
Charles George Site 28

V. REFERENCES 29

Policy 29
Guidance 29
Memoranda 29
Manuals 29
Training 29
Contacts 29

VI. ACTIVITIES CHECKLIST 31

APPENDIX

PRP SEARCH, NOTIFICATION, AND INFORMATION EXCHANGE

I. DESCRIPTION OF ACTIVITY

Introduction

The Potentially Responsible Party (PRP) search process is an investigation into the parties associated with a Superfund site who may be liable for the costs of remedying the release of hazardous substances. Effective PRP searches are fundamental to the Agency's enforcement strategies of obtaining increased PRP involvement in conducting response activities and cost recovery. For remedial sites, searches should be completed within one to one and one-half calendar years of the site's proposed listing on the NPL. In general, a PRP search should be initiated concurrently with the listing site inspection, or at the latest, by the initiation of the listing process.

Exhibit IV-1 presents an overview of the flow of activity during the PRP search.

Objectives of PRP Searches

PRP searches accomplish several primary objectives:

- Identify potentially responsible parties who may be liable under section 107 of CERCLA and provide the information needed to issue general notice letters
- Provide information for special notice letters
- Provide names of PRPs to be included in community relations mailing lists
- Provide information to assess possible full settlements for litigation risks in light of the PRPs' liability and ability to pay response costs, partial settlements for the appropriateness of the settlement case remaining against the non-settlors, and statutory factors (e.g., de minimis)
- Provide information on disposal for the remedial investigation (RI)
- Provide information on whether wastes are RCRA hazardous wastes for assessing potential ARARs
- Document evidence that may be used in cost recovery (section 107), CERCLA section 106 actions, access actions and for liens.

Additionally, the Agency has found that a thorough PRP search enhances EPA's success in negotiating with PRPs to conduct the response activity under EPA supervision.

The extent of the initial search activities is determined by the nature of site activities. At time-critical removal sites, the initial search is limited in scope. In contrast, the initial search activities at long-term remedial sites generally are extensive. Although there may be differences in the scope of initial search activities at removal and remedial sites, the objectives of all PRP searches, as stated previously, are the same. This chapter is oriented primarily to PRP searches at remedial sites. At removal sites, evidence of liability must be obtained for section 106 unilateral administrative orders and cost recovery. While the elements of a search at a removal are often similar to a search in connection with the remedial process, time constraints and the level of expenditures may warrant a modification of the approach. PRP searches at removal sites are discussed in Chapter II, Removals.

Early identification of PRPs enables the Agency to promptly issue General Notice Letters (GNLs). The early issuance of GNLs facilitates the formation of PRP steering committees. Also, provision of waste-in information facilitates the PRPs' agreement on allocations of costs. These negotiation techniques are discussed in detail in Chapter V, RI/FS Negotiations and Chapter VIII, RD/RA Negotiations.

When PRPs are identified and notified early in the remedial process, there is a greater possibility that they will decide to undertake appropriate cleanup actions. Also, identified PRPs may help EPA locate other PRPs to share the costs of the response activity. PRP involvement in the clean-up is generally in the interest of both EPA, which can thereby conserve Fund money, and the PRPs, who avoid the transactional costs of litigation.

RPMs should utilize the expertise of Regional attorneys, the civil investigators, and outside contractors to conduct the numerous tasks of the actual search. In theory, PRP searches should begin as early as possible. However, as a practical matter, the exigencies of the site determine the scope of the initial search activities. Search activities should continue during the response action until all reasonably identifiable parties have been located.

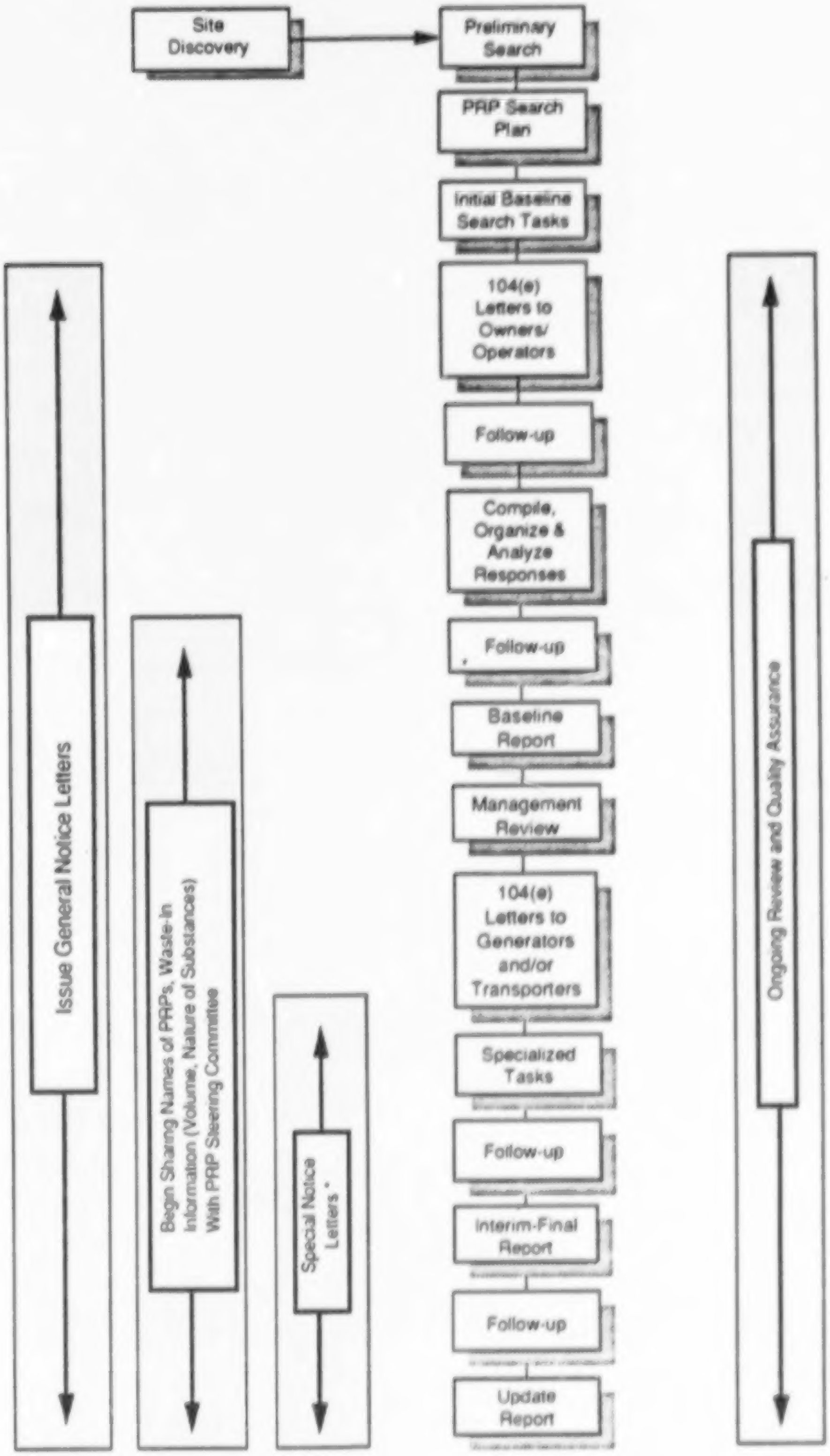
Liability

CERCLA imposes liability where there is a release or threatened release of hazardous substances from a facility. Liability is imposed on four classes of persons, these classes are defined as:

- Present owners and/or operators
  - Present owners or operators of a facility are liable even if they did not contaminate the property. This may include lessors.
- Past owners and/or operators
  - Past owners or operators are liable if they owned or operated the facility at the time hazardous substances were disposed of. Under CERCLA, disposal is not limited to direct deposits.
- Persons who arranged for either the treatment and/or disposal or the transportation for treatment or disposal of hazardous substances (e.g.,

Exhibit IV-1

Overview Of The PRP Search Process


Site Discovery
Preliminary Search
PRP Search Plan
Initial Baseline Search Tasks
104(e) Letters to Owners/ Operators
Follow-up
Compile, Organize & Analyze Responses
Follow-up
Baseline Report
Management Review
104(e) Letters to Generators and/or Transporters
Specialized Tasks
Follow-up
Interim-Final Report
Follow-up
Update Report
Issue General Notice Letters
Begin Sharing Names of PRPs, Waste-In Information (Volume, Nature of Substances) With PRP Steering Committee
Special Notice Letters *
Ongoing Review and Quality Assurance

* Timing of special notice is generally dictated by response planning. The PRP search should be essentially complete for the purpose of RI/FS Special Notice at least 90 days before the planned RI/FS start date. Improved evidence on liability and ability to pay will be collected during the RI/FS.

generators). In the context of a generator, several elements must be proven to establish liability:

  - The generator disposed of or made arrangements for the disposal or treatment of hazardous substances;
  - The generator's hazardous substances or hazardous substances of the same type were present at the site; and
  - An actual or threatened release of the generator's or any other hazardous substance occurred at the facility. This clarifies the general element of a release at multigenerator sites.

  RPMs should note that this class of parties includes parties such as waste brokers. The fact that the defendant can show that it arranged to have its waste dumped elsewhere is irrelevant so long as the Agency can prove that the waste was disposed of at the facility.

- Persons who accept hazardous substances for transport to disposal or treatment facilities that they selected (e.g., transporters).

Additionally, in cost recovery actions, the release or threatened release of a hazardous substance from a facility must cause the Agency to incur response costs.

Strict Liability

If a person falls within one of the four classes of PRPs, section 107(a) of CERCLA imposes strict liability (i.e., legal responsibility is assessed without regard to fault and diligence is no defense) for all response costs incurred at the site.

Joint and Several Liability

When more than one PRP is involved at a site and the harm is indivisible, such as in the case of intermingled drums, commingled wastes and contaminated soil or ground water, the court may impose joint and several liability upon all parties involved at the site. If joint and several liability is imposed on the PRPs, each PRP involved at the site will be individually liable for the cost of the entire response action. EPA could collect all the costs from one PRP. The PRP who paid the costs would then have to seek contribution from the non-paying PRPs.

Limited Defenses Under CERCLA

Under CERCLA, a PRP's liability is subject only to the very limited defenses listed in section 107(b). Thus, a PRP, who would otherwise be liable under section 107(a) of CERCLA, can escape liability only by proving that the release or threatened release was caused solely by either an act of God or an act of war, or in certain narrow circumstances, by a third party who was not an employee and who did not have a contractual relationship with the PRP. In cases where the PRP raises the defense that the release was caused by a third party, the PRP will be excused from liability only if

61

the PRP exercised due care and took precautions against foreseeable acts or omissions of these third parties. Also, under section 101(35)(B) of CERCLA, a person who acquired property after the hazardous substance was disposed, may raise the innocent landowner defense. To assert this defense, the defendant must prove, among other things, that he/she acquired the property without knowing, or having reason to know, that hazardous substances were disposed of in, on, or at the property. A private party may also avoid liability by establishing that it is a subsequent owner of the land who acquired the site through bequest or inheritance, and that the party exercised due care and took precautions against the foreseeable acts and omissions of the third party.

General Approach to PRP Searches

Since the RPM is responsible for managing the response action at the site, it is vital for the RPM to understand the Agency's policies and procedures for completing a thorough PRP search. The purposes of the PRP search are to identify PRPs, obtain information to satisfy special notice requirements, provide information to assess settlements including PRPs' liability and ability to pay, and to obtain evidence for potential section 106 orders and litigation.

It is important to develop a PRP search plan. In general, the initial stage of a PRP search will involve ten baseline tasks. These are followed by development of a baseline report, which summarizes the findings. Depending on the complexity of the site, one or more of 18 additional specialized tasks may also be required. Once these are complete, an interim-final report is issued.

Baseline Search Tasks

For reasons of budget, timing, and standardizing site management, EPA has selected a core group of tasks to be conducted at most sites. There are 10 core search tasks that should be executed during most "baseline" searches. The tasks are intended to provide the Agency with basic information about the site and the PRPs' involvement at the site. At some sites, such as manufacturing facilities where off-site generators were not involved, the search strategy may be tailored to fewer than 10 tasks. In most cases, the level of effort (LOE) for completing these 10 tasks ranges from 200 to 500 hours, depending on site complexity. These tasks are set forth below:

- Agency record collection and file review
- Records compilation
- Interviews with government officials
- Title search
- History of operations at the site
- PRP name and address update
- PRP status/PRP history

- Financial status
- CERCLA 104(e)/RCRA 3007 letters
- Report preparation.

Depending on the circumstances, it also may be appropriate to include specialized tasks such as aerial photographs and compliance history evaluations in the baseline tasks.

Specialized Search Tasks

At complex sites with multiple generators, the completion of these 10 basic investigative tasks does not conclude the PRP search. To conduct a thorough search, the search strategy should provide for additional tasks and document the rationale. Site-specific data gathering problems are addressed by using a combination of the 18 additional (i.e., "specialized") search tasks, in conjunction with the 10 basic tasks. The 18 specialized tasks provide further avenues of investigation that assist the RPM and contractors in uncovering additional information about the PRPs and information about their involvement at the site. While many of the specialized tasks may be useful in some PRP searches, the same tasks may not be useful in other searches. RPMs should consult with an attorney in the Office of Regional Counsel and one of the Regions' civil investigators. RPMs should exercise professional discretion in determining which of the 18 additional tasks are most applicable to a particular site.

The 18 additional search tasks are divided into four general categories:

- Sources of Information
    - PRP File Review
    - Private Citizen/PRP Interview
    - Field Survey
    - Site Sampling
    - Site Enforcement Tracking System
    - Aerial Photographs
    - CERCLA Subpoena Authority
    - Private Investigator.
- Waste Stream Analysis
    - Industrial Surveys
    - Process Chemistry Analysis
    - Waste Stream Inventory.
- Databases
    - Transactional Databases
    - Correspondence Tracking Databases

  - Document Inventory Databases.

- Additional Miscellaneous Tasks

  - Compliance History
  - Financial Assessment
  - Generator Ranking
  - Property Appraisal.

Managing the Search Process

The RPM must ensure that all appropriate basic and additional investigative tasks are conducted at the site. Prior to initiating these tasks, RPMs should formulate a search plan designed to address site-specific situations (refer to the appendix at the end of this chapter) using a combination of the 10 baseline tasks with one or more of the 18 additional (i.e., specialized) tasks. The RPM should tailor the PRP search plan to the circumstances of each case instead of attempting to pigeon-hole the circumstances of each site into a fixed search format.

In conducting the search tasks, the RPM should manage the tasks in an iterative process; they are not discrete and insular tasks that are performed only once. When both the required and the necessary specialized tasks have been completed, an interim final report will be issued. The investigation should continue after the interim-final report to follow-up on leads and to fill any data gaps. The PRP search process is described in greater detail in section II of this chapter.

PRP Search Reports

A PRP search report for a site should present the facts pertaining to the PRPs' liability. Generally at least two reports will be issued for every search (except in simple owner-operator situations where the baseline report will usually suffice): the baseline report and the interim-final report. Usually, the baseline report is issued after the basic investigative tasks have revealed information identifying site owners and/or operators. The interim-final report is issued after appropriate additional search tasks have been conducted identifying generators and transporters. Both reports should follow the format shown in Exhibit IV-2.

References

OSWER Directive 9834.6, Potentially Responsible Party Search Manual (August 1987).

OWPE, "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (June 16, 1989).

Key Players in the PRP Search Process

In addition to the RPMs, there are three key players involved in the PRP search process: Regional attorneys, Civil Investigators (CIs), and contractors. To achieve "early and better" PRP searches, RPMs must effectively coordinate their efforts with these other key players.

67

Exhibit IV-2(1)

PRP Search Report Format

I. **PRP Search Report**

A. Concise site history including nature of activities during specified time periods and any sampling results

B. Identification of owners and operators

   1. Describe the time periods during which the person owned and/or operated the facility and state whether the disposal of hazardous substances occurred during that period

   2. Describe title search results

   3. Provide copies of complex title analysis narrative plus a title tree and graphs representing title search results

   4. Describe activities of various operators

   5. Provide current address and corporate status.

C. Identification of persons who arranged for either the treatment or disposal of the hazardous substances, e.g., generators.

   A. Summarize each of the PRPs' name and current address,volume and nature of the substances, and volumetric ranking. (This is for special notice.)

   B. Develop, by PRP, as necessary, a complete waste-in list with information on the period when the substances were sent to the site, volume and identity of the hazardous substances (40 C.F.R. §304.2) and EPA's determination of any RCRA waste codes. Ensure that there are references to underlying documents and transporters in this list or in the evidence sheets in Appendix B. (This is a summary of evidence and is for internal purposes; it is based on the evidence sheets.)

D. Identification of transporters

   1. Summarize each of the transporters' names and current addresses, volume and nature of the substances, and volumetric ranking. (This is for special notice.)

   2. Develop by each transporter, as necessary, a list that

      - links transporters to generators (and therefore hazardous substances) to the site, and

      - addresses whether the transporter selected the site.

Exhibit IV-2(2)

PRP Search Report Format

E. For owners, operators, generators and transporters, assess the identified PRPs' financial viability (where in question). Identify entities that have been or are in bankruptcy, corporations that are defunct (no longer in business but not dissolved), corporations that are dissolved, and individuals that have died, with a description of the status of their estate. Describe facts in corporate successorships, parent-subsidiary, and possible invidual liability situations.

F. Information for Special Sites:

1. Municipal landfills

2. Area wide groundwater contamination or stream contamination where sources are not clear (relies on special surveys and the RI)

3. Remote sites (company with multiple sites and transshipments)

4. Special financial and capacity issues.

G. Other possible PRPs (list PRPs not in parts B,C, or D above due to substantial evidentiary issues).

I. Search Report Appendix

A. Evidence evaluation sheet for each owner, operator, generator, and transporter (include source of information evaluation)

B. Summary of all work conducted during the PRP search

1. Document investigatory steps during the search, including "dead end" leads

2. Identify persons interviewed and corporations and individuals to whom information request letters were sent. In addition, identify each response to the information request letters and any follow-up actions that were taken. Clearly identify the dates of each of the above activities.

3. Identify leads that could still be pursued

C: Supporting Documentation; assign document control numbers consistent with information management plan

1. Title document

2. Government documents

3. Interview summaries

Exhibit IV-2(3)

PRP Search Report Format

4. Manifests, contracts, invoices, etc. (if numerous, assign document control numbers)

5. Section 104(e) letters and responses (keep separate for FOIA etc. purposes).

6. Other

D. Location of supporting files.

RPMs

The RPM or CI, depending on the Region, is responsible for managing the PRP search process. He/She oversees the search process and provides guidance to the contractor. RPMs and CIs generally perform the following functions:

- Establish the PRP search priorities
- Establish the PRP search strategy
- Manage contractor-conducted search tasks:
    - Define the scope of the search, in consultation with ORC
    - Develop PRP search work assignments, budgets, and schedules
    - Review baseline, interim, and final contractor deliverables, in consultation with ORC
    - Introduce the contractor to State and local government contacts.
- Issue information request letters
- Ensure follow-up on all tasks necessary for conducting a complete search
- Implement quality assurance/quality control procedures to ensure the accuracy of data gathered during the search
- Ensure that adequate information is gathered for special notice letters
- Ensure that adequate evidence of a PRPs' liability and ability to pay is gathered.

RPMs must coordinate with ORC to determine whether the collected information contains sufficient information to establish the PRPs' liability.

Regional Attorneys

The ORC attorneys are responsible for directing case development for each site. Attorneys' level of involvement will vary from Region to Region. Some attorneys participate actively in the search activities. Other attorneys do not get involved in the process until the review of either the baseline or interim final PRP search report. RPMs should seek to involve the attorneys as early as possible to ensure that the search produces sufficient credible evidence of the PRPs' liability. For example, RPMs should consult with the attorneys about developing information request letters and devising appropriate PRP interview questions. Regional counsel also should be consulted on the scope of the PRP search.

In general, the attorneys can provide advice to the RPM on CERCLA-specific legal issues, which may have some bearing on the case in general and the search in particular. For example, the attorneys can provide advice about complex liability issues such as corporate successors, and possible legal defenses, such as the innocent landowner defense.

Civil Investigators

There are at least two CIs in each Region. CIs have responsibilities in developing a Regional PRP search strategy that is consistent with EPA policy and overseeing the implementation of this strategy. The CIs bring a variety of skills to their position and can provide the Agency with investigative skills that are often lacking in the contractor community.

The CI's role in enforcement activities varies from Region to Region. In general, CIs may:

- Manage the PRP search, including overseeing the contractor's work assignment
- Provide investigative assistance to RPMs and the PRP search work assignment manager.

CIs usually conduct crucial interviews or follow up investigation leads that were left open by the contractors. For example, CIs can be used when information is needed about additional parcels of land and there is insufficient time to assign a contractor to the task.

CIs can also assist the RPM in completing the PRP search in the following time-critical situations:

- Statute of limitations is about to expire
- Contractor has provided incomplete information.

In some Regions, CIs play an active role in enforcement activities. For example, CIs conduct preliminary field work and help define the scope of a contractor's work assignment. The CI's role may vary depending on the site, and RPMs should coordinate with Regional management to ensure the proper utilization of CI resources.

Contractors

The Agency secures the assistance of contractors to conduct activities, such as baseline search tasks. By actively managing and overseeing the processes involved in the PRP search, the RPMs and CIs should ensure that the contractor produces a quality product.

Two primary contract vehicles exist for providing support to PRP searches:

- Technical Enforcement Support (TES) contractors may provide the following support:
    - conduct PRP search
    - develop databases to support PRP search

  - conduct EPA seminars on PRP searches.

- Contract Evidence Audit Team (CEAT) contractors may provide the following support:

  - conduct PRP search audits and provide results to the CI

  - conduct EPA seminars on PRP searches.

The tasks assigned to the contractor should be well defined. The RPM and the CI should confirm that the contractor has performed the assigned tasks. One way of doing this is to require the contractor to submit interim deliverables (e.g., baseline report, status reports). By reviewing these deliverables, the RPM can confirm that the contractor has not lost sight of the defined search objectives.

I. PROCEDURES AND INTERACTIONS

This section is designed to assist the RPM in improving the timeliness and quality of the PRP search process. Throughout the PRP search process, RPMs must work toward the objective of locating and obtaining relevant information on the liability of the PRPs.

Exhibit IV-3 provides a flowchart of the specific activities discussed in this section.

A. *Initiating a Preliminary PRP Search*

A preliminary PRP search is conducted when a site is discovered. The object of a preliminary search is to determine obvious PRPs who may be available to conduct appropriate response activity at the site. Once the site has undergone a listing inspection, the RPM must conduct a more extensive PRP search to locate other PRPs.

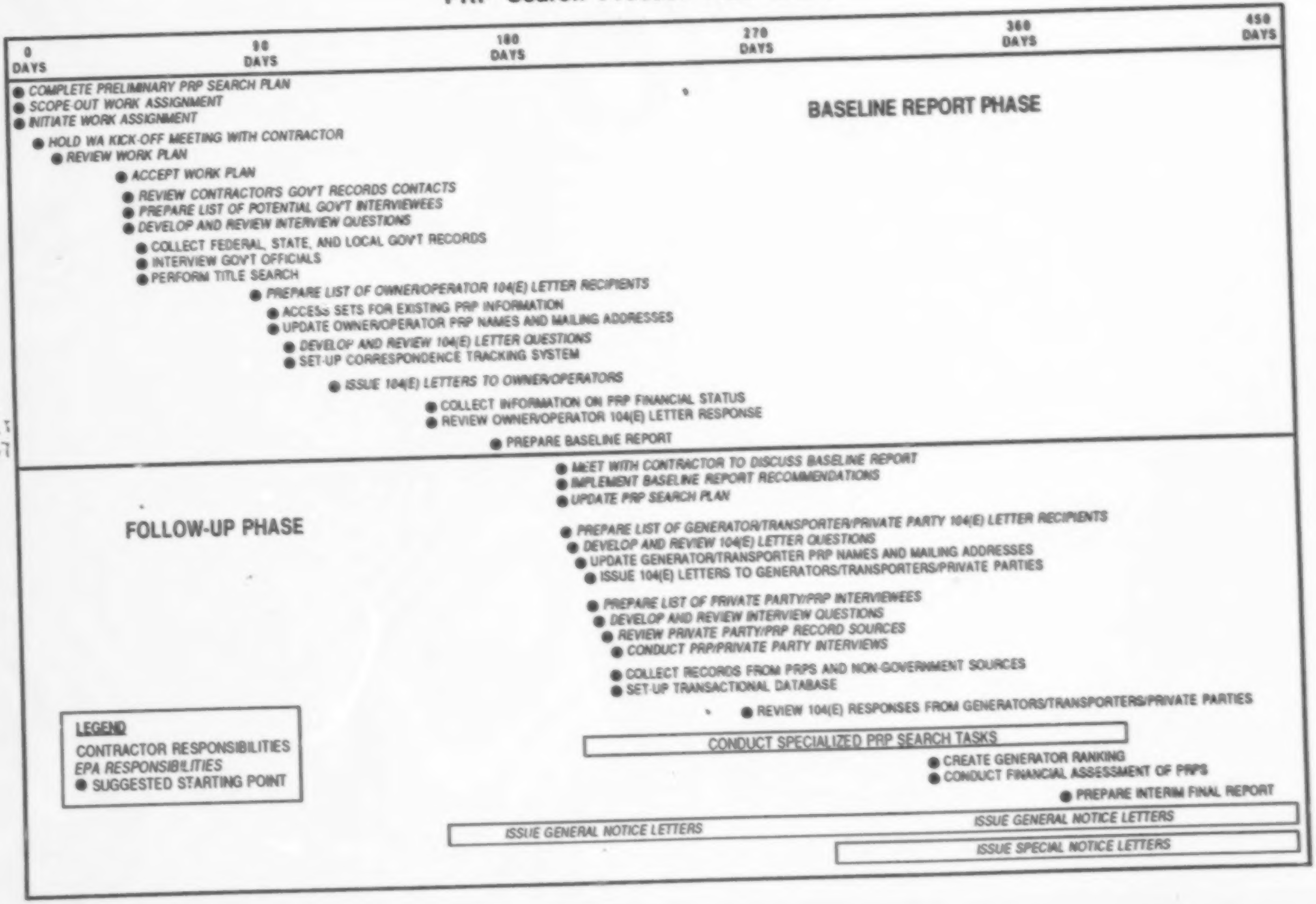
B. *Develop PRP Search Plan*

An effective enforcement strategy requires the early and continuous involvement of all key players, including RPMs and civil investigators. The development of a search plan consists of four activities:

- Develop a plan for managing the PRP search, including the baseline search, issuance of information request letters, additional search tasks, investigative strategy for identifying generators and transporters, follow-ups, and evidence reviews. See the appendix and section VI of this chapter for an outline of possible considerations. In developing the plan, the RPM should:
    - avoid the use of generic work plans without considering the site specific circumstances
    - work with Regional attorneys to tailor the strategy so that it accurately reflects the actual search requirements of the particular site
    - take into account RCRA land ban information needs.
- Identify special problems that require specialized strategies, such as:
    - municipal landfills
    - area-wide ground-water contamination or stream contamination where sources are not clear. The RPM should set forth special survey needs and special investigatory tasks for the remedial investigation.
    - remote sites, such as where one company owned or operated multiple sites and transshipped wastes between them.
- Develop a detailed resource plan for EPA staff.
- Develop a detailed scope of work for contractors that includes phased deliverables followed by RPM review.

Exhibit IV-3

PRP Search Process Flow Chart


0 DAYS
90 DAYS
180 DAYS
270 DAYS
360 DAYS
450 DAYS
BASELINE REPORT PHASE
COMPLETE PRELIMINARY PRP SEARCH PLAN
SCOPE-OUT WORK ASSIGNMENT
INITIATE WORK ASSIGNMENT
HOLD WA KICK-OFF MEETING WITH CONTRACTOR
REVIEW WORK PLAN
ACCEPT WORK PLAN
REVIEW CONTRACTOR'S GOV'T RECORDS CONTACTS
PREPARE LIST OF POTENTIAL GOV'T INTERVIEWEES
DEVELOP AND REVIEW INTERVIEW QUESTIONS
COLLECT FEDERAL, STATE, AND LOCAL GOV'T RECORDS
INTERVIEW GOV'T OFFICIALS
PERFORM TITLE SEARCH
PREPARE LIST OF OWNER/OPERATOR 104(E) LETTER RECIPIENTS
ACCESS SETS FOR EXISTING PRP INFORMATION
UPDATE OWNER/OPERATOR PRP NAMES AND MAILING ADDRESSES
DEVELOP AND REVIEW 104(E) LETTER QUESTIONS
SET-UP CORRESPONDENCE TRACKING SYSTEM
ISSUE 104(E) LETTERS TO OWNER/OPERATORS
COLLECT INFORMATION ON PRP FINANCIAL STATUS
REVIEW OWNER/OPERATOR 104(E) LETTER RESPONSE
PREPARE BASELINE REPORT
FOLLOW-UP PHASE
MEET WITH CONTRACTOR TO DISCUSS BASELINE REPORT
IMPLEMENT BASELINE REPORT RECOMMENDATIONS
UPDATE PRP SEARCH PLAN
PREPARE LIST OF GENERATOR/TRANSPORTER/PRIVATE PARTY 104(E) LETTER RECIPIENTS
DEVELOP AND REVIEW 104(E) LETTER QUESTIONS
UPDATE GENERATOR/TRANSPORTER PRP NAMES AND MAILING ADDRESSES
ISSUE 104(E) LETTERS TO GENERATORS/TRANSPORTERS/PRIVATE PARTIES
PREPARE LIST OF PRIVATE PARTY/PRP INTERVIEWEES
DEVELOP AND REVIEW INTERVIEW QUESTIONS
REVIEW PRIVATE PARTY/PRP RECORD SOURCES
CONDUCT PRP/PRIVATE PARTY INTERVIEWS
COLLECT RECORDS FROM PRPS AND NON-GOVERNMENT SOURCES
SET-UP TRANSACTIONAL DATABASE
REVIEW 104(E) RESPONSES FROM GENERATORS/TRANSPORTERS/PRIVATE PARTIES
CONDUCT SPECIALIZED PRP SEARCH TASKS
CREATE GENERATOR RANKING
CONDUCT FINANCIAL ASSESSMENT OF PRPS
PREPARE INTERIM FINAL REPORT
ISSUE GENERAL NOTICE LETTERS
ISSUE GENERAL NOTICE LETTERS
ISSUE SPECIAL NOTICE LETTERS
LEGEND
CONTRACTOR RESPONSIBILITIES
EPA RESPONSIBILITIES
● SUGGESTED STARTING POINT

After the PRP search plan has been formulated, the RPM may begin to implement and manage the process of collecting and analyzing relevant information about the PRPs. The contents of a PRP search plan are discussed in Chapter III, Comprehensive Site Planning and are included as an appendix to this chapter.

C. *Baseline Search*

Referring to the flowchart presented in Exhibit IV-3, the preparation of a PRP search baseline report may, in a typical case, require six months. The initial steps include developing a PRP search plan, formulating the work assignment, and reviewing and accepting the contractor's work plan.

By structuring the execution of the 10 baseline tasks into inter-related and iterative steps, the RPM can effectively exercise his/her oversight authority. RPMs should note that this iterative approach is merely one of many logical methods for organizing search activities. Other approaches may be more appropriate in different situations.

A suggested structure for conducting the baseline tasks prior to the preparation of the baseline reports is presented below:

- Conduct preliminary records review (simultaneously) :
    - conduct title search to identify past and present site owners and possibly to identify adjacent property owners for possible future reference
    - identify government agencies that may have relevant information and collect documents
    - conduct interviews with government officials to develop information on site operations that may not be recorded in documents
    - update and verify names and addresses.
- Issue information request letters as authorized by section 104(e) of CERCLA and section 3007(a) of RCRA to owners and operators.
- Perform records compilation, organization, analysis, and follow-up:
    - collect and copy all owner/operator records
    - organize files into a useful and easily accessible source of information
    - develop a concise history of the site and operations at the site and review for information gaps
    - obtain additional information about PRPs and their status, including financial status

76

- develop a list of other possible PRPs, identifying generators, and transporters
- verify PRP names and addresses. Ensure that any name changes, mergers, acquisitions, and dissolutions are accurately recorded.
  - for persons and unincorporated entities, this information should include association with other PRPs and involvement at the site
  - for corporations, this information should include the date of incorporation, whether corporation currently exists, names of parent or successor corporations
- follow up on all leads to ensure a comprehensive identification of PRPs involved at the site. Confirm that sufficient evidence has been collected to establish the elements of liability for each owner/operator.

- Prepare the baseline report. Refer to the format in Exhibit IV-2.

D. §104(e) Letters Issued to Owners/ Operators and Follow-up

The initial steps in the baseline search, discussed above, will produce basic information about the PRPs at a site. The information will identify owners and operators and provide leads on generators. At sites that operated prior to 1980, "waste-in" information about generators may be limited. As part of the baseline search the owner or operator should be required to provide information that is as complete as possible under the circumstances. Later, as part of the interim final report regarding generators and transporters, it will be necessary to follow up on time frames, amounts, and the hazardous substances in the materials.

The contractor can develop an initial list of people who should receive information request letters; however, the RPM, in consultation with Regional counsel, is ultimately responsible for selecting the recipients. Information request letters may be issued in one of two ways: as separate letters or as part of the general notice letter.

Typically, the information requested during the baseline search includes details concerning the waste operations and waste management practices of the past and present owners/operators. It also seeks particular information on the time period of disposal or treatment and on generators (PRPs, including transporters that may have contributed hazardous substances to the site), transporters, waste volumes, and the nature of the hazardous substances at and sent to the facility. The RPM should specifically request information on the RCRA designation of all the waste the PRP sent to the facility or site. The facts obtained from the recipients will also assist Regional management to identify additional PRPs, issue additional information requests, and conduct interviews.

The facts collected from the information request letter will help the RPM determine whether the respondent should receive a general notice letter. For this reason, the

77

Agency has articulated a preference for using information request letters to gather the initial facts about PRPs.

Statutory Authority

Section 104(e) of CERCLA and section 3007(a) of RCRA authorize the Agency to issue information request letters. RCRA section 3007 includes sites with hazardous wastes as defined in section 1004(s) which is not limited to Subtitle C. The authority to conduct information gathering activities has been delegated to the AA, OSWER, and the AA, OECM by Delegation 14-6, "Inspections, Sampling, and Information Gathering, Subpoenas and Entry for Response" (September 13, 1987). Under Delegation 14-6, the authority of Regional Administrators to issue compliance orders or subpoenas is limited by the requirement that they must first consult with AA, OECM (or his/her designee). On November 19, 1987, AA, OECM redelegated this consultation authority to the Associate Enforcement Counsel for Waste.

General Content of 104(e) Letters

The information request letter should include a brief identification and description of the site. The letter should cite EPA's statutory authority under section 104(e) of CERCLA and section 3007(a) of RCRA to request the information. The 104(e) letter should indicate that the Agency plans to vigorously enforce its information gathering authority. RPMs should specifically refer to the enforcement provisions in section 104(e)(5) of CERCLA. RPMs also should give a general statement setting forth the purpose of the request and its relationship to the overall case.

Recipients should be requested to provide information as indicated in OSWER Directive 9834.4A, "Final Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 1988). This includes the following categories of information:

- Owners
  - names and addresses, including updated information
  - periods of ownership and type of ownership
  - corporate successorship
  - site history during ownership including conditions, operations, disposal (including disposal and the substances disposed of during periods of past owners and operators of the facility (for liability), and information on amounts, nature, and locations for the remedial investigation)
  - information on whether wastes were RCRA hazardous wastes (for evaluation of potential ARARs)
  - lessors/lessees and the above information about them
  - information related to defenses; de minimis status

  - for small businesses, individuals with control

- Operators
  - similar to above, except operation
  - individuals in charge

- Financial Information
  - ability to pay
  - insurance (PRP's comprehensive general liability and environmental impairment insurance)

- Information that the owner/operator has concerning wastes at the site and possible generators/transporters
  - records of names/addresses, quantities, substances
  - any arrangements made with regard to materials sent to or from the site

- A description of information the owner/operator has on the total and each shipment of materials transported to, or stored, treated, or disposed at the site including
  - dates of shipment or disposal
  - quantity and nature of the materials
  - hazardous substances (as defined in 40 CFR §302.4) contained in the materials. This includes information on the waste and waste stream as possible RCRA hazardous wastes to enable the Agency to determine if RCRA may be an ARAR (e.g., land ban)
  - updated names and addresses

- Documents
  - copies of all business records relating to activities at the site, including customer lists, gate logs, ledgers, invoices, accounts receivable and back up income records for taxes, correspondence

- Names and addresses of individuals who have information regarding the above

- Any data or studies resulting from environmental investigations at the site

- A description of the files searched by the person (or corporation) in response to the Agency's request

- Special information for particular classes of sites, such as municipal landfills

- A description of the recipient person's or corporation's relationship to the site.

The response must be in writing, under oath. The letter should also indicate that the PRPs are responsible for informing the Agency if any information contained in the PRPs' response is confidential and subject to protection under section 104(e) of CERCLA.

The Agency's statutory information-gathering authority is not limited to collecting facts directly relating to the hazardous substance release. EPA has authority to seek any information that is reasonably calculated to lead to information about the release.

In some cases, the recipient will be unable to provide EPA with the information sought. Therefore, RPMs should include a request that the person (or corporation) submit an affidavit describing the scope of his/her investigation if the search does not disclose all of the information sought. The affidavit must be signed by a corporate officer. The information request letter should inform the recipient about opportunities for consultation with EPA.

Insurance Information

Section 104(e)(2)(C) of CERCLA expressly grants the Agency authority to request information relating to a party's ability to pay for or perform a response action. In effect, the Agency has the authority to ascertain whether a PRPs' insurance policy may cover and is sufficient to pay for the costs of remedying the damage. RPMs should inquire about the PRPs' comprehensive general liability and environmental impairment insurance. RPMs should use two approaches to obtain information about the PRPs' insurance coverage:

- Ask general questions

- Request a copy of the policy

RPMs should be as neutral as possible when requesting information about the PRPs' insurance policies. RPMs should avoid using terms such as "pollution exclusion," "sudden," "non-sudden," or "accidental." These terms have special meaning in environmental insurance law. Rather, RPMs should ask the PRP to provide information such as the name of the company(s), the policy number, the effective dates of the policy, and the "per occurrence" limits of each policy.

RPMs should request that the PRP provide a copy of his/her insurance policy. This is an effective way for RPMs to obtain necessary insurance information without having the

50

PRP risk compromising his/her coverage. If the PRP does send a copy of the insurance policy, RPMs should consult with ORC to determine the extent of the PRPs' coverage.

Written Response and Due Date

The information request letter should require a written response under oath in an affidavit and contain a definite due date. This date should reflect the type and volume of information that the RPM anticipates will be necessary for the recipient's answers to be responsive. Generally, 30 days from the date of receipt is deemed to be an adequate time for responding.

RPMs should inform the recipient about the possible civil penalties that may be imposed if the recipient fails to respond. Under section 104(e)(5)(B)(ii) of CERCLA, the Agency may request that a court impose penalties of up to $25,000 per day for unreasonable non-compliance with the information request.

RPMs should send the letter by certified mail, return receipt requested. RPMs should avoid using post office box addresses because there may be no signature to indicate receipt of the letter. The information on the return receipt provides the Agency with proof (the signed receipt card) that a representative of the PRP received the letter.

E *Compile, Organize, and Analyze 104(e) Letter Responses*

Owner/operator responses to information request letters should be available before the preparation of the baseline report. The information in the responses should be analyzed with an eye toward extracting information that can be presented in the baseline report and the PRP evidence sheets. Refer to Exhibit IV-2 to see the format for this information. The most important information request issue is review and follow-up; therefore, it should be noted that a more detailed information request may be issued after the baseline report has been prepared. In situations where the response to section 104(e) letters appears false, the RPM should refer the situation to Regional Counsel.

Responses to information requests should be organized alphabetically by PRP and placed in an appendix to the baseline report . The RPM should assure that there is no unnecessary copying. References to the information contained in a response should be made to this appendix. By organizing the responses in this manner, the RPM greatly simplifies the Freedom of Information Act (FOIA) response process in that the information request responses are readily accessible for review, copying, and dissemination at the proper time.

Responding to FOIA Requests

PRPs may request information under the Freedom of Information Act (FOIA). RPMs should agree to provide only the information and documents that are within the scope of a proper request. Under FOIA, the RPM can decline to provide "investigatory records compiled for law enforcement purposes...to the extent that the production of such records would interfere with enforcement proceedings." The RPM also may decline to provide pre-remedial deliberative process material under FOIA exemption 5. RPMs should provide *only* the information that the statute requires. PRPs who do not respond to information requests are not given information until they respond. RPMs should *not* send the PRPs an entire copy of either the baseline or interim-final reports. If RPMs have any questions as to the appropriateness of complying with the FOIA request, they should contact one of the attorneys in ORC.

Enforcement Strategy for Non-Compliance With Information Requests

If recipients of 104(e) letters ignore EPA's requests for information within the specified time (usually 30 days) or provide incomplete answers, the Region can implement the following enforcement strategies:

- Issue an administrative order to compel compliance with the request for responsive written information
- Initiate a judicial action seeking:
  - a court order compelling the recipients to provide the requested information and/or documents and
  - civil non-compliance penalties.

The RPM should consult with the Regional attorney to decide which enforcement strategy to implement at a particular site.

Administrative Order to Compel Compliance

Under section 104(e)(5)(A), the Agency can issue an administrative order to compel compliance with the information request. Administrative orders are issued by EPA and involve a notice and an opportunity for consultation. Consequently, EPA can respond promptly to a recipient's non-compliance. However, if the recipient continues to ignore the request for information, the Agency will have to refer to DOJ a petition to enforce EPA's administrative order. This process may be time-consuming.

Judicial Action to Compel Compliance

Section 104(e)(5)(B) of CERCLA provides the authority to initiate a civil lawsuit to compel a person to respond to the Agency's information request and substantial monetary penalties against a PRP who fails to respond. These civil penalties are based on strict liability. EPA does not have to prove that the PRPs intended to violate the law by not responding in a timely manner. Therefore, the fact that a recipient says that he/she did not intend to violate the law is irrelevant. The PRP is still subject to civil penalties imposed by the court.

When the Agency refers a case to DOJ to enforce an information request, the referral should be handled in accordance with the procedures set forth in "Expansion of Direct Referral of Cases to the Department of Justice" (OECM, January 1988). In time-critical situations, the RPM should refer to "Procedures for Processing Oral and Other Expedited

S2

Referrals" (OECM, December 1987) and "Waste Procedures for Processing Oral and Other Expedited Referrals" (OECM, April 1988).

Section IV of this chapter discusses specific case examples where the Agency used judicial action to enforce its information requests.

F. *Baseline Search Progress Review*

The RPM is responsible for managing the search in accordance with the strategy, updating the strategy as necessary, and meeting schedules. Exhibit IV-3 shows these responsibilities in detail.

RPMs must ensure that sufficient follow-up is being made to site information so that the baseline report contains complete and accurate information in light of its limited purpose. This is particularly important with regard to owner/operator liability and financial viability, updated PRP names and addresses, information from owners, operators and the State about the volume and nature of substances sent to the site and the contributing parties, and the information that is being used to determine whether a person should recieve a notice letter and the evidence of each PRP's liability. It is important to review responses to section 104(e) requests for completeness. RPMs must also ensure that the leads that are uncovered by the contractor during the investigation are followed up and that the action taken is properly documented. Follow-up letters to section 104(e) requests may be needed when the PRPs fail to respond adequately or EPA identifies other relevant pieces of information.

It is important that both the contractor and the RPM keep records of initial and follow-up actions and determinations so that a well-documented trail is maintained. Contacts with both interviewees and records sources should be documented. This ensures that if in the future, due to needs for further evidence or changed personnel, the investigation were to be reconstructed, sufficient documentation would exist to determine what leads had been followed-up and how all reasonably available sources of information had been exhausted. This written record will attest to the thoroughness and completeness of a particular PRP search.

G. *Prepare Baseline Report*

The baseline report presents a concise summary of the information obtained from the baseline search activities. Back-up information is set forth in supplemental appendices. In effect, the baseline report is an interim report that contains available information in the areas specified in Exhibit IV-2. It provides information on the owner/operators and provides leads on generators and transporters, enabling the RPM and Regional management to assess the extent and nature of gaps in the PRP data.

RPMs, with the input of ORC and the CI, should carefully review the report to determine whether it is likely that all possible PRPs have been listed, the completeness of waste-in information, and the sufficiency of the information documenting a PRP's liability and financial viability. All information in the report should be attributed to a specific source. Reports are enforcement confidential. RPMs should ensure that the cover of the report clearly states that it was prepared in anticipation of litigation. This enables the Agency to protect the information contained in the report. Any copies of reports should be numbered for tracking purposes.

H. *Management Review*

Regional supervisors, with ORC, RPM and CI input, will review the baseline report to determine whether the search activity at the site has generated the information needed to identify all PRPs, determine their contribution to the site, and establish their liability and viability. In addition, the review should consider the reasons for pursuing or not pursuing leads uncovered by contractors. The search strategy should be updated in view of the baseline report and management review. During the review process, RPMs should continue search activity, such as follow up on section 104(e) requests. The review is intended to facilitate, rather than impede, the information-gathering process. Once the review is complete, the person in charge of the search should ensure that the search personnel and contractors implement all suggested changes and follow-up activities.

I. *104(e) Letters to Generators and Transporters*

The approach for issuing information request letters to persons who arranged for disposal, hereafter called generators, and transporters is similar in scope to the procedures involved in issuing letters to owners and/or operators. The 104(e) letters issued to generators should request information regarding their liability. In addition, RPMs should seek information to resolve the issue of whether the substance was a listed or characteristic hazardous waste as defined by RCRA.

Listed hazardous waste is defined in 40 C.F.R. § 261.30. Each listed waste has an EPA Hazardous Waste Number that precedes the name of the substance. Under 40 C.F.R. §261.20 a substance may also be deemed to be RCRA waste if it exhibits the following characteristics: ignitabililty, corrosivity, reactivity and EP toxicity. To determine whether the substances present at a particular site meet this criteria, RPMs should consider asking questions along the following line: "For all waste sent to the facility or site, identify any known RCRA listing designation as defined by 40 C.F.R. § 261.30. If it is unknown whether the wastes sent to the facility or site would be listed wastes if generated after 1980, describe the chemical processes of each waste stream in sufficient detail to enable EPA to determine whether the waste is listed, including information on 'characteristics' designation under RCRA."

J. *Specialized Investigative Tasks*

As part of the revised search strategy, RPMs should consider which of the 18 specialized tasks are needed to conduct a thorough search. Refer to "Managing the Search Process" in Part I of this chapter for a description of when to use these specialized tasks. RPMs should exercise their professional discretion when determining which tasks to conduct at a site. When appropriate, the specialized search tasks may be completed concurrently with the 10 baseline tasks.

Administrative Subpoena

Administrative subpoenas are authorized under section 122(e)(3)(B) of CERCLA. A subpoena compels an individual to answer questions under oath, and when requested, to produce documents. The Regional Counsel will secure issuance of the subpoena and select the location for the proceeding. If the witness ignores the subpoena, the Regional Counsel will prepare a referral to seek an order compelling the witness to respond.

As a practical matter, administrative subpoenas may be useful in obtaining information from the following types of persons: former employees of the PRP company, persons living near the site, and officers of the PRP company. When developing a list of potential witnesses, the RPM should confirm that the contractor has not overlooked any plausible source of information. For example, the old man who sits in the shack at the landfill and the truck drivers who drove the PRPs' trucks may be able to provide a wealth of information about the PRPs' waste management practices.

While there is no statutory authority prohibiting the use of administrative subpoenas for gathering initial information, RPMs should not use subpoenas for this purpose. The Agency has stated a preference for using information request letters to obtain initial information about a person's involvement at the site. Subponeas inherently support the settlement process by increasing the amount of relevant information.

K. *Interim-Final Report*

As indicated by the name, the interim-final report is not viewed as an end in itself. Rather, the interim report is one of the many steps in the overall investigation. The investigation at a site should continue until all necessary reasonably obtainable information pertaining to a PRPs' liability and viability is collected.

The time at which the interim final report is completed varies, depending on the response activity schedule for the site and the progress that is being made on the PRP search. Ideally the report should be available in time for issuance of the SNLs and the release of information on the names and addresses of the PRPs, and the volume and nature of substances sent to the site. If possible, this takes place approximately six months before the RI/FS special notice letters are issued. In some cases, particularly multi-party sites, it may be necessary to prepare preliminary information in order to issue general notice letters, special notice letters, and to release information to the PRPs. Updated versions of the report can then be prepared for the RD/RA special notice and, possibly, for CERCLA sections 107 and 106 actions. The format that should be followed for all PRP search reports is shown in Exhibit IV-2.

RPMs/CIs should focus their attention on the facts contained in the report and not lengthy historical or other narratives. RPMs should consider using evidence summary sheets. This format focuses the research on the type of information needed for evidence. The evidence sheet format also standardizes the data presentation so that it is more readily transferrable to a tracking system or inventory data base.

When reviewing the interim-final report, the RPM must confirm that the contractor has carefully documented the rationale tying each PRP to the site and that the report substantiates the evidence.

L *Interim Report Follow-up*

Information on new PRPs, as well as additional evidence on the liability of existing PRPs, is likely to be uncovered after the completion of the interim-final report. For this reason, a PRP search is an on-going investigation. The search does not end with the completion of the interim-final report, the issuance of general and special notice, or the release of the contractors from the PRP search work assignment. A PRP search is completed when reasonable leads concerning a person's involvement at a site have been exhausted, taking into account the amount obligated for the response action or a settlement. It should be noted that in many situations, circumstances may require that the search continue throughout the course of the RI/FS, and possibly, into the RD/RA.

In addition to being an ongoing investigation, a PRP search, in some cases, is never really closed. To compensate for the ongoing nature of search activities at a multi-party site, the interim-final report may be submitted on a preliminary basis in time for general or special notice, and on an interim-final basis when all search activity and follow-up for the preliminary report is completed.

M. General Notice Letters (GNLs)

General notice letters designate an entity as a PRP. These letters are preliminary determinations of potential liability, as opposed to absolute determinations of liability. Therefore, there is no requirement that the RPM must possess substantial evidence of a person's liability before a GNL can be issued. Besides designating a person as a PRP, the GNLs are used to encourage PRP coalescence, an important step prior to negotiations. Therefore, GNLs should be issued as early in the PRP search process as possible.

GNLs generally contain the following information:

- Notification of potential liability under sections 106 and 107(a) of CERCLA, including notification that
    - section 107 authorizes the Agency to initiate cost recovery actions to recover all costs not inconsistent with the NCP incurred in responding to the release or threatened release of hazardous substances
    - section 106 authorizes the Agency to issue administrative orders compelling the PRP to implement the response selected by EPA to abate an imminent and substantial danger caused by the release or threatened release of hazardous substances.
- Discussion of any planned response measures, to the extent known; the Agency encourages PRPs to voluntarily perform or finance those response activities that EPA determines to be necessary at the site.
- Information about the Agency's discretionary authority under section 122(e) of CERCLA to formally negotiate the terms of settlements pursuant to special notice procedures if EPA determines that such procedures would facilitate an agreement and would expedite remedial action at the site.

- Information about the general opportunity to discuss any selected response measures and opportunities to undertake the selected response action, including
    - the merits of forming a PRP steering committee
    - a response date for the PRPs to respond, in writing, indicating their willingness to participate in the response activities at the site
    - a name and a phone number of the EPA contact for PRPs (or their attorneys) to call.
- Information about the development of the Administrative Record pursuant to section 113(k) of CERCLA.

RPMs should use their professional judgment to tailor the contents of GNLs to accommodate the circumstances at a specific site. GNLs should be sent by certified mail, return receipt requested. A formal record documenting the PRPs' receipt of the letter should be created. RPMs should carefully document all subsequent correspondence (phone calls or letters) received from the PRP or the PRPs' attorneys.

In general, the standard governing who receives a GNL is based upon a reasonable belief that a potential recipient may be a PRP. Certainty is not required. GNL recipients must be approved by both Regional management and ORC. RPMs should carefully consider the question of who receives a GNL. Once a person or corporation has been designated as a PRP and issued a GNL, their name will be released as a PRP in response to FOIA requests about the site.

GNLs should be issued in "waves" as soon as the necessary information becomes available, and they should precede special notice for the RI/FS. The first wave is issued when owners and operators are identified. Subsequent waves are issued as groups of generators and transporters are identified. Finally, additional letters are sent to PRPs who have been identified by other PRPs through negotiations. If special notice letters for RI/FS are scheduled and general notice letters have not been issued, GNLs need not be sent if they would not advance the process.

Copies of GNLs should be sent to:

- Information Management Section of the Program Management and Support Office of OWPE at EPA Headquarters
- Regional Administrative Record Coordinator
- Regional Community Relations Coordinator for inclusion on the community relations mailing list

S7

- Appropriate State representative
- Federal and State natural resource trustees.

References

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 1987).

OSWER Directive 9834.10A, "Model Notice Letters" (February 7, 1989).

OSWER Directive 9836.2, "CERCLA Community Relations Mailing Lists" (February 6, 1989).

N. Ongoing Information Exchange

Following general notice, RPMs may hold informal discussions with the PRPs (as distinguished from the formal negotiations pursuant to special notice procedures). If PRPs are represented by an attorney, Regional Counsel must be present. These informal discussions generally result in an ongoing exchange of information. A PRP is generally provided a copy of any information EPA may have regarding that PRP following the PRP's response to an information request. More broadly, as soon as is reasonably possible, the RPM should provide the PRPs with information on the names, addresses, volumes, and nature of substances from all PRPs.

To facilitate this exchange of information, the RPMs should propose a meeting with the PRPs. These informal meetings enhance the likelihood of successful negotiations. In the event that these informal talks break down, RPMs should work closely with Regional attorneys to develop a realistic negotiation strategy.

SS

II. PLANNING AND REPORTING REQUIREMENTS

The RPM should implement a management strategy that tailors the PRP investigative tasks so that the PRP search works in conjunction with the overall enforcement strategy at a particular site. The Agency has made a commitment to improve the timeliness and completeness of PRP searches. RPMs should seek the assistance of ORC attorneys and other key players early in the search process to achieve high-quality PRP searches early in the process.

A. *Planning*

In general, RPMs or CIs should initiate PRP searches before the site is proposed for inclusion on the NPL. Ideally, the PRP search should be completed shortly after the NPL proposed listing. The interim-final PRP search report should be completed at least 90 days before the funds are obligated for a projected RI/FS start. For SCAP reporting purposes, a PRP search is deemed to be complete when either the site classification report has been issued, or when the site classification has been otherwise determined.

B. *Budget*

The standard PRP search budget is $50,000. This figure translates into an LOE of approximately 1,000 hours. Historically, baseline PRP searches with limited or no follow-up research have required approximately 500 LOE hours to complete. For this reason, RPMs are encouraged to make full use of this funding. RPMs should consult with Regional management to determine resource commitment limitations.

C. *Reporting Requirements*

A matrix of SCAP/SPMS measures relevant to PRP search activity is presented as Exhibit IV-4.

In addition to SCAP/SPMS reporting requirements, RPMs are also responsible for completing an accurate CERCLIS site information form (SIF) for all PRP search activity. Exhibit IV-5 provides an example of a completed SIF for a NPL PRP search or a non-NPL removal search. RPMs should complete the SIF using the example outline of fields and possible values:

A. Activity Type/Code (NS = NPL RP search or RP = Non-NPL removal search)
B. Lead (FE = Federal Enforcement)
C. Plan start/completion dates (FYQ)
D. Actual start/completion dates (MM/DD/YY)
E. SCAP Note (Indicate any comments concerning the search, e.g., outcome)
F. Enforcement Activity Outcome Code/Name
G. Number of PRPs discovered at the site
H. Financial Requirements:

    1. Financial Type Code and Name (G = Planned Case Budget Obligation)
    2. Financial Amount (Required to conduct the search)
    3. Plan Date (FYQ, dates funds will be needed)
    4. Contract Vehicle (TES)
    5. Budget Source (E = Enforcement)

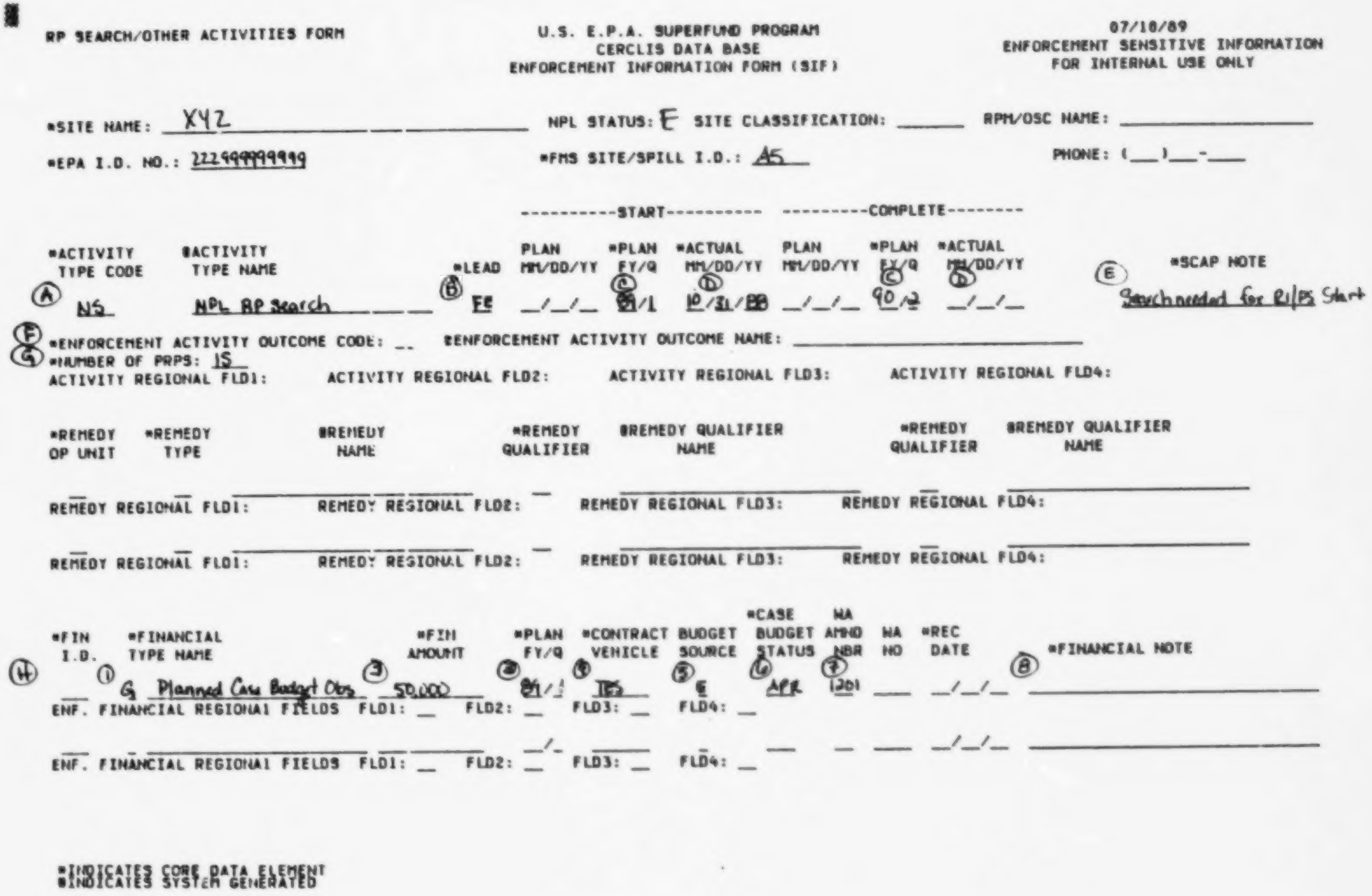
Exhibit IV-4

SCAP/SPMS Measures Relevant to PRP Searches

ACTIVITY	SPMS REPORTING	SCAP PLAN/REPORT	QTRLY	ANNUAL
NPL PRP Search Start		X	X	X
Non-NPL PRP Search Start		X	X	X
NPL Sites with Completed PRP Searches		X	X	X
Non-NPL Sites with Completed PRP Searches		X	X	X
104(e) Letters Issued		X	X	X
104(e) Referrals		X	X	X

Exhibit IV-5

Sample SIF for PRP Search Activity



RP SEARCH/OTHER ACTIVITIES FORM

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS DATA BASE
ENFORCEMENT INFORMATION FORM (SIF)

07/10/89
ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ NPL STATUS: F SITE CLASSIFICATION: ____ RPM/OSC NAME: ____

*EPA I.D. NO.: 222999999999 *FMS SITE/SPILL I.D.: A5 PHONE: (__)__-__

			----------START----------			---------COMPLETE--------			
*ACTIVITY TYPE CODE	*ACTIVITY TYPE NAME	*LEAD	PLAN MM/DD/YY	*PLAN FY/Q	*ACTUAL MM/DD/YY	PLAN MM/DD/YY	*PLAN FY/Q	*ACTUAL MM/DD/YY	*SCAP NOTE
		Ⓑ		Ⓒ	Ⓓ		Ⓒ	Ⓓ	Ⓔ
Ⓐ NS	NPL RP Search	FE	_/_/_	89/1	10/31/88	_/_/_	90/2	_/_/_	Search needed for RI/FS Start

Ⓕ *ENFORCEMENT ACTIVITY OUTCOME CODE: __ *ENFORCEMENT ACTIVITY OUTCOME NAME: ____

Ⓖ *NUMBER OF PRPS: 15

ACTIVITY REGIONAL FLD1: ACTIVITY REGIONAL FLD2: ACTIVITY REGIONAL FLD3: ACTIVITY REGIONAL FLD4:

*REMEDY OP UNIT	*REMEDY TYPE	*REMEDY NAME	*REMEDY QUALIFIER	*REMEDY QUALIFIER NAME	*REMEDY QUALIFIER	*REMEDY QUALIFIER NAME

REMEDY REGIONAL FLD1: REMEDY REGIONAL FLD2: REMEDY REGIONAL FLD3: REMEDY REGIONAL FLD4:

REMEDY REGIONAL FLD1: REMEDY REGIONAL FLD2: REMEDY REGIONAL FLD3: REMEDY REGIONAL FLD4:

*FIN I.D.	*FINANCIAL TYPE NAME	*FIN AMOUNT	*PLAN FY/Q	*CONTRACT VEHICLE	BUDGET SOURCE	*CASE BUDGET STATUS	NA AMND NBR	NA NO	*REC DATE	*FINANCIAL NOTE
Ⓗ	①	③	②	④	⑤	⑥	⑦			⑧
__	G Planned Case Budget Obs	50,000	89/1	TES	E	APR	1201	__	_/_/_	

ENF. FINANCIAL REGIONAL FIELDS FLD1: __ FLD2: __ FLD3: __ FLD4: __

__			_/_			__	__	__	_/_/_	

ENF. FINANCIAL REGIONAL FIELDS FLD1: __ FLD2: __ FLD3: __ FLD4: __

*INDICATES CORE DATA ELEMENT
*INDICATES SYSTEM GENERATED

• NOTE: This exhibit presents page one of the SIF. The actual SIF includes a second page for additional comments

6. Case Budget Status (APR = Approved, ALT = Alternate; indicates whether funds are approved in the case budget)
7. WANO (Work Assignment Number)
8. Financial Note (comments on finances)

If the NPL PRP search or the non-NPL removal search is being conducted by a contractor, the start date is defined as the date the work assignment is procured. If the search is conducted by EPA, the start date is defined as the date that EPA staff begin the PRP search activities.

The PRP search is completed when: 1) the Region has gathered information required by the program guidance, including information on generators and necessary information on financial viability, and has sufficient information to mail general notice or special notice letters (name and addresses of PRPs, volume and nature of substances contributed by each PRP; volumetric ranking) and, at NPL sites, the classification of the sites has been determined, or 2) if no PRPs are found, the date and the outcome of the search are entered into CERCLIS.

The Regions should record pertinent information at the completion of search activities "F" and "E."

IV. POTENTIAL PROBLEMS/RESOLUTIONS

This section addresses several problems that RPMs may encounter when attempting to identify and document the involvement of PRPs at a particular site.

A. Timing

A comprehensive PRP search and notification process should be initiated early in the remedial process. Early searches facilitate PRP coalescence for settlement negotiations and promote increased PRP participation in RI/FS and RD/RA activity. Conversely, the failure to properly plan the search, oversee it, assure follow up and "complete" it may unnecessarily delay the RD/RA negotiations, or stall cost recovery or CERCLA section 106 case development.

B. Clarifying Roles and Responsibilities

The RPM should ensure that all parties involved in the PRP search process clearly understand their roles and responsibilities. This objective can be accomplished by:

- Developing PRP search management plans
- Tailoring contractor's work plan to site-specific requirements
- Assigning responsibility for follow-up
- Conducting an "evidence" review.

In some Regions, the RPMs spend time in the field gathering initial data to determine the appropriate scope for the search process. In other Regions, the RPM assigns initial data gathering tasks to the contractor and then uses this data to define the scope of the search process at the kick-off meeting.

RPMs may use meetings as a means of improving the cooperative efforts of the contractor and State and local officials. For example, these meetings could be used to provide the contractors with a list of State and local government contacts. Before issuing such a list, the RPM should provide the contractor with a letter of introduction. The purpose of the letter is to introduce the contractor to State and local government officials and to inform these officials that the contractor is working for EPA on a particular PRP search.

C. Resource Commitments

The quality of a search is a function of planning, proper and focused utilization of contractors, oversight, and follow up. Sufficient money must be budgeted in the enforcement case budget. RPMs should consult with their management to determine the Region's limitation on the initial commitment of resources for a PRP search. This figure varies from Region to Region. The standard PRP search budget is $50,000. This figure translates into approximately 1,000 hours of LOE, and should be sufficient for most sites. The object of the search is to uncover all reasonably available evidence of the PRPs' liability. The RPM should ensure that the investigative process is planned and conducted properly the first time. If an RPM determines that the conditions at a particular site require supplemental work and funding, the RPM should ensure that these planned expenses are reported on the SCAP.

When planning the search budget, RPMs should avoid under-committing resources to the necessary search, and should be realistic in committing resources. Under-committing resources is as inefficient as over-committing resources. When RPMs under-commit, they limit the search activities. For instance, in a limited search, the contractor may only perform a records search and conduct several interviews with government officials. This limited search may not be adequate for a complex site. Poor-quality searches do not produce the type of evidence needed to establish a person's liability under section 107 of CERCLA. Without sufficient information, a second and more complete search must be conducted. Consequently, the Agency loses both time and money. Therefore, RPMs should work closely with Regional management in determining how to effectively commit resources for a particular site.

D. Examples of Enforcing Information Requests

The Agency has statutory authority to enforce its requests for information. There are two recent examples of the Agency's efforts to enforce its requests. Each case is discussed below.

The Cannons Sites

The Agency sought to enforce its request for information about a PRPs' involvement at the Cannons sites in Massachusetts and New Hampshire, Region I. On March 28, 1986, the Agency sent letters to over 500 PRPs. Crown Roll Leaf, Inc. ("Crown") was one of the recipients. The return receipt card indicated that Crown received the letter on April 1, 1986. A complete response was due within 30 days of receipt (i.e., May 1, 1986). Crown failed, without justification, to provide EPA with the requested information and documents relating to the transportation of toxic waste. On August 18, 1986, the Agency sent Crown a reminder letter. Crown again failed to respond.

Section 3008(a) of RCRA was employed to enforce response to the notice letters (prior to SARA, a number of notice letters were issued pursuant to RCRA section 3007). On November 14, 1986, the Agency sent Crown the following:

- Administrative order compelling a response
- Administrative complaint
- Proposed consent agreement.

The administrative order demanded that Crown provide the requested information and documents. The administrative complaint notified Crown that it could contest liability for failure to respond to the information request. The proposed consent agreement required Crown to submit responses to the information request and to pay a penalty in settlement for EPA's claims for failure to respond.

In December 1986, Crown's attorney telephoned a Regional attorney to discuss the matter. After this conversation, Crown still failed to submit a written response to the Agency's information requests. On February 16, 1988, the Agency initiated a judicial action against Crown. The Federal district court ruled that since the EPA information request form specifically requested a written request, Crown's phone conversation with the Regional attorney did not constitute adequate compliance.

This case is important because it supports the Agency's right to demand a written response to the information request letter.

Charles George Site

In this case, the Agency sought to impose civil penalties upon two PRPs who failed to respond to information request letters. At the time, CERCLA did not contain the provisions of section 104(e)(5)(B) for imposing per diem non-compliance penalties. Prior to the enactment of SARA, only RCRA contained provisions for non-compliance penalties. Therefore, the award of civil penalties in the Charles George case was decided under the RCRA provisions.

On February 4, 1985, EPA sent a written request for information concerning the landfill and its operation to Charles and Dorothy George (recipients). On March 6, 1985, the recipients requested an additional 60 days to respond; EPA denied the request and urged the recipients to reply as promptly as possible to minimize noncompliance penalties.

The Agency took a firm stand on enforcing the requests for information. EPA allowed only four months to elapse before filing suit in Federal district court. The suit petitioned the court to:

- Issue an order compelling the recipients to promptly provide the requested information
- Impose per diem penalties authorized by RCRA [42 U.S.C. § 6928(g)] for failure to respond within the specified time.

The district court determined that seven of the 26 questions were insufficiently relevant to require a response; the recipients were ordered to answer the remaining questions and each recipient was fined $20,000. The recipients appealed. The Federal appeals court upheld the lower court's decision. Consequently, the recipients were compelled to answer the remaining 19 questions and pay a total of $40,000 in civil fines.

This case is important because the court imposed a substantial civil fine on the recipients. The case also demonstrates that the requests for information must be reasonably related to the statutory authority. Therefore, RPMs should work closely with the Regional attorneys to develop appropriate, and enforceable, requests for information.

V. REFERENCES

Policy OSWER Directive 9835.0, "Interim CERCLA Settlement Policy" 50 FR 5034 (December 5, 1984).

Guidance OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 1987).

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 1987).

OWPE, "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (June 16, 1989).

OSWER Directive 9834.10A, "Model Notice Letters" (February 7, 1989).

OSWER Directive 9836.2, "CERCLA Community Relations Mailing Lists" (February 6, 1989).

OSWER Directive 9834.4A, "Final Guidance on Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" (August 1988).

OSWER Directive 9835.1A, "Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies" (October 1988).

Memoranda OWPE, "Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests" (January 26, 1984).

OECM, "Liability of Corporate Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)" (June 13, 1984).

OWPE, "Policy for Enforcement Actions Against Transporters Under CERCLA" (December 23, 1985).

Manuals OSWER Directive 9834.6, Potentially Responsible Party Search Manual (August 1987).

Region I Training Manual, Enforcement and Remedial Activities Under SARA (May 1989).

Training OWPE, CERCLA Enforcement Division, Technical Support Branch conducts periodic PRP Search Workshops and CI Conferences. For additional information, contact FTS 382-5612.

Contacts PRP searches: The CERCLA Enforcement Division's Technical Support Branch: (FTS) 382-5612

Information Requests: OECM Attorney Advisor at (FTS) 382-3066, or an attorney in ORC.

Administrative Subpoenas: OECM Attorney Advisor at (FTS) 382-3077, or an attorney in ORC.

97

VI. ACTIVITIES CHECKLIST

This section discusses the RPM's management functions in overseeing the PRP search process. The following checklist is not intended to present an exhaustive set of procedures. RPMs should exercise their professional discretion when deciding what procedures are appropriate for a particular site.

1)_____ Conduct a preliminary PRP search.

2)_____ Develop a PRP search plan and assemble the resources needed to conduct the PRP search activities.

  a)_____ Ensure that contractor dollars are budgeted for negotiations in the enforcement case budget.

  b)_____ Develop search plan/strategy

  - Activities
  - Roles and responsibilities
  - Scheduling
  - Information management

  c)_____ Develop a detailed scope of work for the contractor.

  d)_____ Develop a detailed resource plan for EPA staff.

3)_____ Conduct baseline information and records collection, interviews with government officials, title search.

  a)_____ Conduct initial baseline tasks.

  b)_____ If appropriate, conduct additional (i.e., specialized) tasks concurrently with these baseline tasks.

4)_____ Issue 104(e) letters to owners and/or operators.

  a)_____ Issue letters, even if there is only a single PRP or few PRPs and there is information on them, verify it with a §104(e) letter.

  b)_____ Obtain copies of documents.

5)_____ Compile, organize, and analyze responses from 104(e) letters.

a)_____ Track response to letters.

i)_____ Establish the tracking system.

ii)_____ Determine identies of non-responders and incomplete responders.

b)_____ Follow up on recipients who fail to fully comply with the request for information.

i)_____ Send warning letters to recipients who provided incomplete or inadequate information.

ii)_____ Determine whether an administrative order assessing penalties should be issued if recipient fails to respond to warning letter.

iii)_____ Consider initiating a judicial action to enforce the information request order (also consider seeking additional penalties for violating the order) if recipient fails to respond to warning letter.

6)_____ Update PRP status.

a)_____ Determine current name and address.

b)_____ Resolve status of corporations that are defunct, dissolved, bankrupt, merged, sold or had parent.

7)_____ Analyze, follow up, and conduct additional research.

a)_____ Resolve evidence evaluation sheets and financial viability of owners/operators.

b)_____ Develop site history.

c)_____ Request supplemental information and interviews regarding owner/operator liability.

d)_____ List preliminary generators and transporters.

8)_____ Draft the baseline report summarizing information obtained from the baseline search. RPMs should ensure that the information needed to document the PRPs' liability is sufficiently documented The cover of the report should clearly state that the document is **"ENFORCEMENT CONFIDENTIAL"**.

a)_____ All information in the report should be attributed to specific sources. Work done should be documented. Information should be managed per plan.

9)_____ Regional management reviews the baseline report and approves revised search strategy.

a)_____ Identify any data gaps and implement data collection procedures.

b)_____ Adapt search plan for interim final report. Decide which of the 18 specialized tasks to perform.

10)_____ Issue 104(e) letters to generators and transporters.

a)_____ Link generators to the site.

b)_____ Resolve that generators wastes are hazardous substances under CERCLA.

c)_____ Request information regarding the RCRA designation of all waste sent to the facility/site.

d)_____ Seek to resolve the issue of whether the substance was a listed or characteristic hazardous waste as defined by RCRA [see 40 C.F.R § 261.30].

e)_____ Track, follow up, and enforce.

11)_____ Update PRP status for generators and transporters.

a)_____ Determine current name and address.

b)_____ Resolve status of coporations that are defunct, dissolved, bankrupt, merged, sold, or had parent.

12)_____ Conduct interviews as identified in plan and as necessitated by review and responses to §104(e) letters.

13)_____ Conduct other appropriate additional search tasks as identified in strategy and as necessitated by review of responses to §104(3) letters.

a)_____ Analyze information for completeness, ability to issue special notice (name and address; volume and nature of substances; volumetric ranking), evidentiary sufficiency and ability to plan.

b)_____ Follow up as necessary.

14)_____ Prepare the interim-final report. Ensure that all information obtained during the PRP search has been properly documented.

a)_____ Review evidence evaluation sheets, assessing whether there is sufficient information to establish a person's liability under section 107 of CERCLA; review financial viability.

b)_____ Array information for special notice.

c)_____ Identify follow up work needed.

d)_____ Management review.

e)_____ Document persons against whom there is not enough information to be identified as PRPs.

15)_____ Follow up report.

16)_____ Determine when to issue GNLs.

a)_____ Send a letter informing the individual (or corporation) that the Agency considers it to be a PRP. Send a copy to Headquarters for SETS.

b)_____ Assemble back up documents.

c)_____ Develop name and address list. Provide to community relations coordinator, and administrative record coordinator.

17)_____ Initiate an information exchange with PRPs.

a)_____ Meet with PRPs to provide them with information about the site and to explain the negotiations process.

b)_____ Ensure that the contractor adequately updates the transactional database to reflect the information provided by PRPs.

Appendix

PRP Search Plan

1. PRP Search Planning and Initial Strategy
    a. Identify contractor and staff resource needs.
    b. Summarize team roles and responsibilities for managing and performing PRP search tasks.
    c. Discuss the schedule of the PRP search in relation to the overall site timeline.
2. Initial Assessment and PRP Search
    a. Summarize information collected to date.
    b. Develop strategy for collecting and using information.
        - Develop PRP correspondence tracking system and evidence files.
        - Follow up on recipients who fail to fully respond.
    c. Conduct initial search, including title search and interviews with Federal, State and local government officials. (The usual focus is first on owners and operators and then on generators and transporters.)
3. Interim Assessment
    a. Conduct analysis, identify issues, and project follow-up and additional PRP search needs, including unique strategies.
    b. Ensure information regarding PRP liability is well-documented.
    c. Describe steps for PRP notification and information exchange.
    d. Develop a PRP list; including names and addresses.
4. Conclusion of PRP Search
    a. Indicate actions to enhance inter-PRP and PRP-Government relations, such as: encouraging PRPs to form a steering committee, providing information to PRPs and encouraging PRPs to use a facilitator to resolve disagreements.
    b. Assess ability to develop volumetric rankings and NBARs.
    c. Complete information collection (including use of subpoenas), distribution of information (to include Administrative Record coordinator and community relations coordinator), documentation of evidençe and notification (including special notice).

RI/FS NEGOTIATIONS/SETTLEMENT

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
Statutory Authority 1
Overview of the Negotiation Process 1
Roles and Responsibilities 2
    RPM Responsibilities 2
    ORC Responsibilities 2
    OWPE Responsibilities 2
    OECM Responsibilities 3
    DOJ Responsibilities 3

II. PROCEDURES AND INTERACTIONS 4

A. Decision to Start the RI/FS 4
B. Intergovernmental Review 5
C. Formation of the Case Team 5
D. Review PRP Search 6
E. Issue General Notice 6
F. Steering Committees and Information Exchange 7
G. Follow up on PRP Search 8
H. Natural Resource Trustees 8
I. Scoping the RI/FS 8
    PRP Issues 9
J. RI/FS Statement of Work (SOW) 9
K. Draft Administrative Order 10
L. Issue Special Notice Letter 13
    Timing of Special Notice 14
M. Good Faith Offer 14
    Notify DOJ 15
N. Conditions for PRP Conduct of RI/FS 15
O. Negotiations Outcome - PRP-Lead RI/FS 16
P. Negotiations Outcome - Fund-Lead RI/FS 17

III. PLANNING AND REPORTING REQUIREMENTS 18

A. Planning Requirements 18
    Contractor Support 18
B. Reporting Requirements 19
    SCAP/SPMS 19

IV. POTENTIAL PROBLEMS/RESOLUTIONS 21

A. Stipulated Penalties 21
B. Past Costs 21
C. RI/FS Oversight Costs/Limits 21

D. Removals Required During RI/FS 21
E. Baseline Risk Assessment 21
F. Additional Work 22

V. REFERENCES 23

Guidance 23
Manuals 23
Contacts 23

VI. ACTIVITIES CHECKLIST 24

APPENDIX

RI/FS NEGOTIATIONS/SETTLEMENT

I. DESCRIPTION OF ACTIVITY

Introduction

This chapter discusses the process of negotiating for PRP conduct of the RI/FS and focuses on the RPM's role in the process. EPA policy is to encourage PRPs to perform the RI/FS under EPA oversight, when EPA determines that the PRPs are qualified to do the work and will carry out the activities in accordance with CERCLA requirements and EPA guidance.

EPA prepares for RI/FS negotiations from the time the listing site inspection is undertaken. EPA performs a PRP search, issues General Notice Letters (GNL), and may meet with PRPs prior to beginning RI/FS negotiations. EPA also scopes the project prior to initiating RI/FS settlement discussions. Formal negotiations begin when EPA issues the Special Notice Letter (SNL), continue if there is a Good Faith Offer (GFO), and conclude with the signing/issuance of an administrative order or consent decree, or referral for litigation or the obligation of Fund monies.

Statutory Authority

While section 106 administrative orders may be issued, EPA usually relies on sections 104 and 122 of CERCLA to enter into agreements with PRPs to allow them to conduct all or part of RI/FS activities. The settlement procedures in section 122 of CERCLA are utilized when the Agency determines that the PRPs will conduct the RI/FS properly and promptly.

Authority for RI/FS administrative settlements has been fully delegated to the Regions. However, precedential issues or unique situations should be referred to the Settlement Decision Committee (SDC) at Headquarters. The SDC is discussed in section IV, Potential Problems/Resolutions, of this chapter.

Overview of the Negotiation Process

The RI/FS negotiation process begins as soon as PRPs are given general notice. After initial identification of PRPs, EPA issues a general notice letter to advise the PRPs of their potential liability. The general notice letter is the mechanism by which parties are identified as PRPs and notified about the possible use of the CERCLA section 122(e) special notice procedures and the subsequent moratorium and "formal" negotiation period.

Following general notice, EPA continues to develop the PRP search. After EPA has received responses to information requests and has assembled information regarding waste types and volumes, EPA provides the information to PRPs and encourages them to organize as a group and form a steering committee. The organization of PRPs is an important element in achieving settlements. In addition, EPA, working with contractor support, scopes the focus of the RI/FS. The RPM should coordinate with the State as necessary on the scope of the RI/FS and any administrative order.

EPA may issue a special notice letter regarding the RI/FS. Issuance of the special notice provides a period of negotiation in situations where EPA determines that such a period would facilitate an agreement with PRPs and expedite response actions. The special notice letter is usually accompanied by a draft Administrative Order on Consent (AOC) and RI/FS Statement of Work (SOW). RI/FS negotiations that result in settlement are concluded with the signing of an administrative order on consent (or entry of a consent decree, if the case has been filed in court) which incorporates a SOW.

Generally, settlement devices such as *de minimis* and mixed funding are not employed at this stage. In unique circumstances, a *de minimis* settlement may be considered for very low quantity generators early in the RI/FS process if enough information is available, or the PRPs may request EPA to provide a Non-Binding Allocation of Responsibility (NBAR) under section 122(e)(3) of CERCLA. The negotiation team should be prepared to evaluate requests of this nature, but granting the request is discretionary for the Agency.

The RI/FS negotiation process is summarized in Exhibit V-1.

Roles and Responsibilities

This section describes the roles and responsibilities for the RPMs, assistant Regional counsel, and representatives from OWPE, OECM, and DOJ. The primary activities for each phase of the negotiation process are summarized below. The primary responsibilities for RPMs and ORC are detailed in Exhibit V-2.

RPM Responsibilities

The RPM plays a central role throughout the RI/FS negotiation process and has primary responsibility for technical aspects of the case.

The RPM's role is to educate the PRPs on EPA's negotiation position as well as to provide pertinent PRP and site information. The RPM also may play a central role in assisting the PRPs to organize into a steering committee, and should encourage the formation of a PRP steering committee in nearly all cases. The RPM, in conjunction with the assistant Regional counsel, should set up a correspondence file to track all communication with PRPs. Some of this correspondence will subsequently be entered into the Administrative Record for selection of response. The RPM's role in the timing of special notice letters and the ensuing formal negotiation period is discussed in detail later in this chapter. The RPM also participates in developing the case referral packages for section 106 and section 107 litigation cases. The RPM works jointly with the attorney to develop the technical information in support of a referral package for section 106 and section 107 litigation cases. Similarly, the RPM and the attorney work jointly to develop the Agency's negotiation strategy prior to negotiations with the PRPs and, as needed, to coordinate the negotiation strategy document with the settlement decision committee.

ORC Responsibilities

ORC, in partnership with the RPM, also plays a central role in all phases of the RI/FS negotiations. The assistant Regional counsel's primary role is to provide legal advice during the negotiation process to ensure that the process complies with CERCLA.

OWPE Responsibilities

OWPE is responsible for ensuring national consistency for negotiated settlements and consistency with national policy. OWPE representatives usually are not involved in RI/FS negotiations but may participate on any negotiations team where nationally significant issues are anticipated. OWPE assures necessary coordination with OECM. OWPE also assists the Regions in assembling cost documentation. The Director, OWPE also chairs the settlement decision committee, which is discussed later in this chapter.

Exhibit V-1

RI/FS Negotiation Process

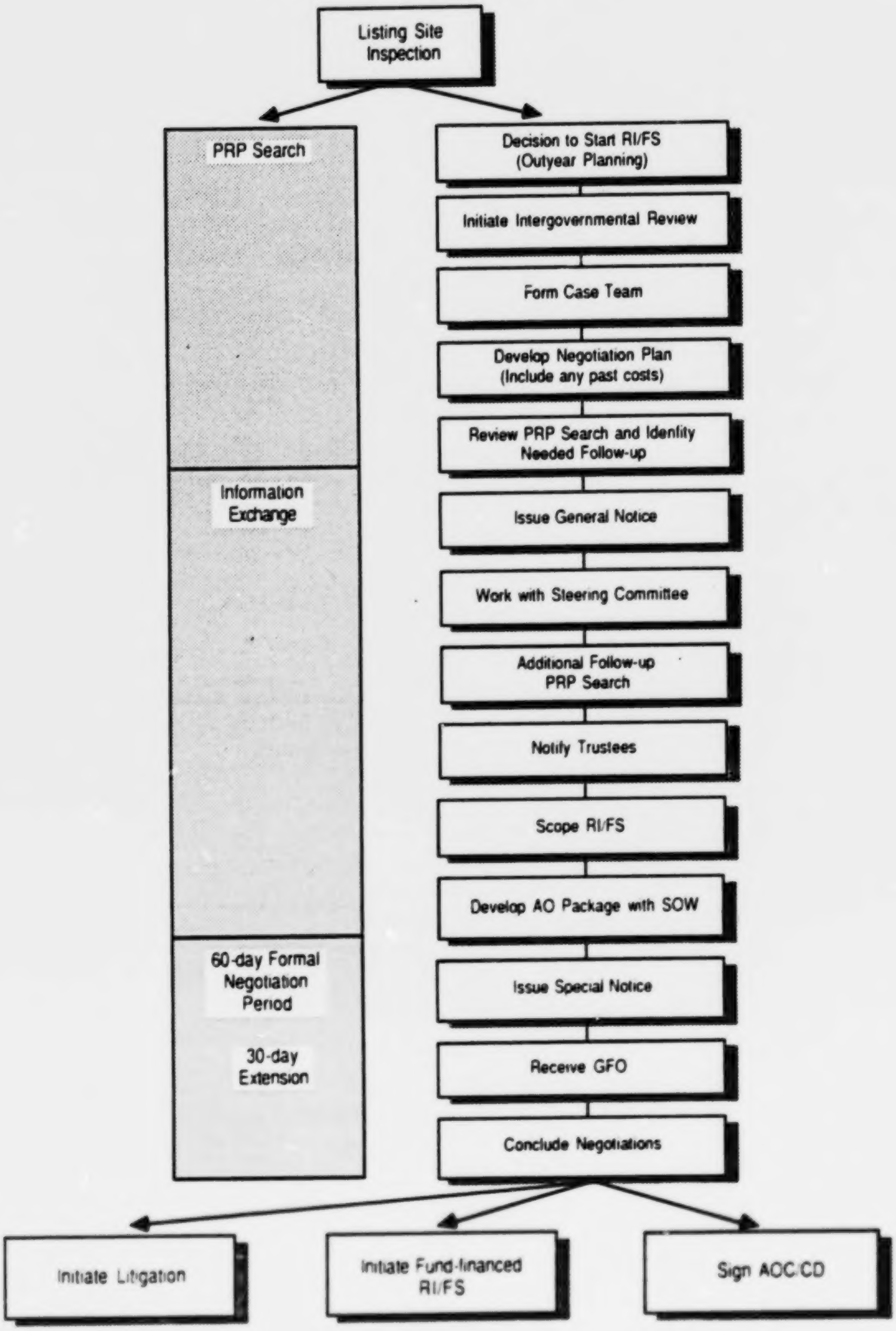

Listing Site Inspection
PRP Search
Information Exchange
60-day Formal Negotiation Period
30-day Extension
Decision to Start RI/FS (Outyear Planning)
Initiate Intergovernmental Review
Form Case Team
Develop Negotiation Plan (Include any past costs)
Review PRP Search and Idenfity Needed Follow-up
Issue General Notice
Work with Steering Committee
Additional Follow-up PRP Search
Notify Trustees
Scope RI/FS
Develop AO Package with SOW
Issue Special Notice
Receive GFO
Conclude Negotiations
Initiate Litigation
Initiate Fund-financed RI/FS
Sign AOC/CD

Exhibit V-2

Roles and Responsibilities

RPM

NEGOTIATIONS PLANNING

- Coordinate information exchange with the PRPs, including §104(e) letters and provide the PRPs with information regarding other PRPs (in conjunction with assistant Regional counsel)
- Assemble cost documentation for any past removals
- Ensure PRP search review and follow up by civil investigator and ORC
- Send GNL
- Coordinate Site Scoping Activities
- Coordinate with State

INFORMAL AND FORMAL NEGOTIATIONS

- Provide information to PRPs
- Send SNLs
- Conduct negotiations as lead technical representative on the case team
- Maintain coordination between appropriate Headquarters and State offices
- Request extensions for negotiations from Headquarters
- Obligate funds from the Trust Fund if appropriate

ORC

NEGOTIATIONS PLANNING

- Review strength of evidence of PRP liability
- Coordinate with civil investigator regarding PRP search activities
- Draft initial Administrative Order
- Notify DOJ of the negotiations if past costs are involved

INFORMAL AND FORMAL NEGOTIATIONS

- Review the SNL
- Conduct negotiations as the lead legal representative
- Redraft the Administrative Order as the result of negotiations
- Coordinate with the State legal representative

OECM Responsibilities

OECM is responsible for ensuring that negotiated settlements are consistent across the Regions with national policy for legal matters. OECM attorneys have expertise in the legal implications of RI/FS settlements. OECM attorneys usually are not involved in RI/FS negotiations but may participate in negotiations where complex or nationally significant issues are anticipated. OECM assists Regional counsel in prereferral matters, reviews referrals sent to DOJ, and also reviews consent decrees resulting from settlements. OECM is represented on the SDC.

DOJ Responsibilities

DOJ's representative from the Land and Natural Resources Division's Environmental Enforcement Section is EPA's attorney for litigation of Superfund cases. DOJ usually is not involved in RI/FS negotiations because these are resolved by administrative orders rather than consent decrees. DOJ is involved in cases involving a compromise of past costs in a RI/FS order in accordance with section 122(h)(1) of CERCLA.

I. PROCEDURES AND INTERACTIONS

This section discusses the procedures for negotiating PRP involvement in the RI/FS, and focuses on the RPM's role in the negotiation process. Certain elements of this process are similar to elements of the RD/RA negotiation process, which is discussed in Chapter VIII, RD/RA Negotiations/Settlement.

A. Decision to Start the RI/FS

The decision to initiate RI/FS activities is made in the course of preparing the annual SCAP. The SCAP process is discussed in Chapter XVII, SCAP/SPMS Cycle. The RI/FS start, as planned in the SCAP, affects the schedule for negotiations with the PRPs.

A PRP search generally should commence at least one to two years before negotiations are scheduled to begin except at sites without generators, where less time is necessary. Negotiation planning usually is initiated six to nine months prior to the planned RI/FS start date in SCAP. When planning an RI/FS start, RPMs should keep in mind that, in cases where the special notice letter procedure is implemented and a good faith offer is received by EPA within 60 days, RI/FS activity is unlikely to begin for at least 90 days after special notice issuance. When negotiating SCAP/SPMS targets, the RPM, Information Management Coordinator (IMC), and other Regional personnel involved in SCAP negotiations should consider the following factors in proposing an RI/FS start at a site:

- Budget: Will funds be available to initiate activity at the site on the planned date?
- Site classification: Is the site targeted as PRP-lead or Fund-lead?
- Length of time on SCAP: How long has the site been identified on the SCAP as an NPL site?
- Environmental significance of the site: How great is the threat to human health and the environment posed by the site?
- Status of the PRP search: Is the PRP search near completion? How great is the possibility of identifying viable PRPs?
- PRP capabilities: Are PRPs qualified?
- Willingness of the PRPs to cooperate: What is the likelihood of settlement?

The decision to start an RI/FS involves the SCAP coordinator (or IMC), section chiefs, and branch chiefs. The division director grants final approval on RI/FS start decisions.

B. Intergovernmental Review

RPMs should initiate the intergovernmental review process during settlement negotiations, so that the review process is underway in the event Fund monies are used for site response activity. 40 CFR Part 29, "Intergovernmental Review of the Environmental Protection Agency Programs and Activities," addresses intergovernmental review of Federal financial assistance programs and directs Federal development activities as it relates to the Superfund program. This regulation applies to all remedial projects, including EPA-lead RI/FS projects, initiated under the authority of CERCLA for which EPA or the State designated agency is taking the lead. Responsible parties, however, are not subject to the regulation and their activities accordingly are not subject to the notification procedures outlined in the regulation.

Reference

OSWER Directive 9375.1-4-d, "State Participation in the Superfund Program," Appendix D, "Procedures for Implementing Intergovernmental Review for the Superfund Program" (June 2, 1988).

C. Formation of the Case Team

Primary responsibility for developing settlements rests with the case team, or negotiation team. The negotiation team usually consists of the RPM and the assistant Regional counsel. Additionally, the civil investigator works closely with the case team, and manages or supports the PRP search. The primary responsibilities of the case team follow.

PRP Search

- Ensure that the PRP search is complete, including adequate information for special notice and evidence on PRPs
- Oversee continued investigations as necessary to gather further information on PRPs

General Notice and Information Exchange

- Ensure that PRPs are given general notice
- Ensure early information exchange with PRPs

Special Notice and Negotiation

- Develop and transmit draft settlement documents to PRPs, including technical scopes of work, administrative orders or consent decrees, in advance of negotiations
- Conduct negotiations and maintain deadlines

The case team also assumes a general coordinating role in facilitating a site's progress through the enforcement process.

As part of their general coordinating role in negotiations, the case team should develop a negotiation plan. The negotiation plan documents EPA's approach to productive negotiations with PRPs, functions as a checklist of steps to be taken, guides EPA's negotiation preparation process, resolves anticipated issues, and sets the bottom line for the negotiations. Negotiations where EPA is fully prepared and sets schedules and deadlines are much more likely to result in a signed administrative order on consent. The RI/FS negotiation plan is also discussed in Chapter III, Comprehensive Site Planning, and is included as an appendix to this chapter.

D. *Review PRP Search*

When planning for negotiations, the case team should review thoroughly the PRP search report to ensure that the universe of PRPs has been identified, and that PRP waste-in and liability information is complete enough to support the issuance of special notice letters. The information in the PRP search report also should be sufficient to support the preparation of volumetric rankings included in the special notice. Necessary follow-up work should be identified.

Information requests should be issued as early in the PRP search/negotiation process as practicable. Information requests may be issued as a separate letter during the PRP search process or as part of the general notice letter. Whenever possible, information request letters should be issued independently and well in advance of the general notice letter. Issuance of the information request letter prior to the general notice letter is especially encouraged in situations where information from PRPs is necessary to determine whether the issuance of a general notice letter is appropriate. Issuance of the GNL marks the point at which EPA determines that a party is a PRP.

Information request letters are discussed at length in Chapter IV, PRP Search, Notification, and Information Exchange.

E. *Issue General Notice*

The general notice letter informs PRPs of their potential liability, may begin or continue the process of information exchange, and initiates the process of "informal" negotiations. "Informal negotiations" refer to any discussions that are not conducted as part of the negotiation moratorium triggered by issuance of special notice under section 122 (e) of CERCLA.

General notice letters should be issued at all sites that are proposed for or listed on the NPL. However, it may not be appropriate to issue the general notice at sites where a notice pursuant to previous guidance was issued before the reauthorization of CERCLA or where the Region is ready to issue special notice at the site. These exceptions are important for minimizing any possible disruption to ongoing activities.

The general notice letter identifies a party as a PRP and informs the recipient of its potential liability for all response activities and costs incurred by the government. General notice letters should be sent to all parties for whom there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA. The RPM, in consultation with ORC, should issue the general notice to PRPs as soon as possible. OWPE has developed a model general notice letter. The procedure for issuing general notice letters and the contents of the letter are discussed in detail in Chapter IV, PRP Search, Notification and Information Exchange.

References

OSWER Directive 9335.3, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" Appendix A, "PRP Participation" (October 1988).

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations and Information Exchange" (October 19, 1987).

OSWER Directive 9834.10A, "Model Notice Letters" (February 1989).

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 12, 1987).

F. Steering Committees and Information Exchange

The case team should encourage PRPs to form a steering committee early in the negotiation process. This encouragement, however, should not suggest that EPA will negotiate only with one steering committee. Steering committees greatly facilitate negotiations in multi-party cases since the Government may negotiate with one committee that represents the PRPs, and PRPs may resolve differences among themselves through the committee. The case team should encourage PRPs to form a steering committee at the time of the general notice letter or at the first meeting between the Government and PRPs. If necessary, the case team should educate the steering committee in the Superfund enforcement process, including providing the committee with pertinent information such as PRP identification, waste-in lists, relevant policies, and technical data. As new PRPs are identified, the case team should refer them to the steering committee.

Establishment of PRP steering committees provides several logistical and tactical advantages to the negotiation process, including:

- Providing the circumstances for experienced PRPs to educate less-experienced PRPs
- Providing the Government with a central point for dissemination of information and government decisions
- Providing a single point of issuance of PRP proposals and decisions
- Providing a forum in which PRPs may negotiate among themselves to determine allocations among their own members.

While steering committees may be advantageous to reaching settlement, the case team should be aware of possible disadvantages of dealing with steering committees. Some PRPs may not trust the recommendations of the committee if they do not believe it fairly represents their concerns, and these PRPs may elect not to settle. If the committee leadership is unfamiliar with CERCLA, or is internally fractious, the entire settlement can be jeopardized. The case team needs to be sensitive to these concerns in determining how it will relate to a particular steering committee.

G. Follow up on PRP Search Before initiating formal negotiations with PRPs, the case team should review the PRP search report and correspondence from the PRP steering committee for any information that may lead to the identification of additional PRPs. Any such leads should be pursued and in the event additional PRPs are identified, the new PRPs should be issued a general notice, advised of the status of informal negotiations, and informed of the existence of a PRP steering committee, if appropriate.

H. Natural Resource Trustees Section 122 (j) (1) of CERCLA requires EPA to notify appropriate Federal trustees and provide an opportunity for the trustee to participate in the negotiations if a release or threat of a release at a site may have resulted in damages to natural resources. Delegation R-14-25 delegates responsibility for notifying trustees to OWPE/OERR. RPMs generally do not assume responsibility for notifying trustees. Headquarters intends to provide a list of projects in the SCAP to the trustees as notice to participate in the negotiations.

Section 104 (b) (2) of CERCLA also requires EPA to notify the appropriate Federal and State trustees of potential damages. The Federal trustees are notified on a regular basis once a site is listed through the National Response Team/Regional Response Team. However, State trustees must be notified by the RPM. This notification should take place at the time of site listing and during the RI, especially if potential damages are found. Federal and State trustees also are provided the opportunity to comment on the RI/FS work plan.

RPMs must coordinate notification efforts with the Department of the Interior and the Bureau of Natural Resources. Notification of trustees at this stage of the negotiation process may identify issues to be considered in scoping the RI/FS.

I Scoping the RI/FS Scoping is the initial planning phase of site remediation, and should be initiated by the RPM with contractor support at least several months prior to the beginning of negotiations. By conducting preliminary scoping activities before negotiations with PRPs begin, EPA enters negotiations with a better idea of the nature and extent of the technical work that needs to be done at the site. When EPA has scoped the technical work and site management requirements at a site, negotiations with PRPs are more focused and the PRP-conducted work is likely to be of higher quality than when adequate scoping activity has not occurred.

The ability to develop a comprehensive site management strategy and site objectives is closely tied to the amount and quality of information available at the time. It should be recognized that the objectives and strategy may not be fully developed at this stage. As new information is acquired or new decisions are made, data requirements are reevaluated and, if appropriate, the site management strategy or objectives are modified.

The site objectives should specify the purpose of any activities to be conducted at the site including any interim actions that may be necessary, as well as the preliminary objectives of possible remedial actions (e.g., the cleanup goals). These objectives should specify the contaminants and media of concern, the exposure pathways and receptors, and an acceptable contaminant level or range of levels for each exposure route. The site objectives are developed and based on existing site information, contaminant-specific ARARs, when available, and risk-related factors.

The site management strategy is developed once the objectives have been established and identifies the study boundary areas and the optimal sequence of site activities, including whether the site may best be remedied as separate operable units. The general management approach should include: actual and potential site problems, any interim actions that are necessary to mitigate potential threats or prevent further environmental degradation, and the optimal sequence of activities to be conducted at the site. Also included in the site management strategy should be the decision as to whether the RI will serve as a continuation of the PRP search. This would be appropriate at sites where all of the sources of contamination are not yet well defined.

PRP Issues

Determination of site boundaries may be a particularly significant issue for PRPs. The case team must carefully evaluate preliminary site information to determine if RI activities should occur in a more extended or restricted geographic area. This decision may be particularly difficult in situations that involve area-wide ground-water contamination or commingled ground-water contamination plumes, where contamination sources are identified off-site and indicate that additional PRPs may be identifiable. Scoping activities may thus uncover information that is valuable to following up PRP search efforts, or identifying additional PRPs.

Site access also may be an issue significant to PRPs in negotiations. The case team should be aware of any potential site access issues when preparing for negotiations.

Reference

OSWER Dir. 9355.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (October 1988).

J. *RI/FS Statement of Work (SOW)*

The RI/FS SOW describes, in a comprehensive manner, the RI/FS activities to be performed as anticipated prior to the onset of the project. The SOW establishes the broad objectives, general activities to be undertaken, and deliverables to be submitted by PRPs in the RI/FS. The SOW should be prepared before issuance of special notice, and included in the notice letter when issued to the PRPs. OSWER has prepared a model SOW for PRP-lead RI/FS activities (June 2, 1989). The major components of a SOW, as identified in the model, are set forth in Exhibit V-3. The model SOW is consistent with the revised RI/FS guidance (October 1988) and proposed NCP.

The draft site-specific SOW may be prepared by the RPM and other Regional personnel, with contractor help on scoping. Some circumstances may warrant EPA preparation of a work plan before or during negotiations. For a particular site, the RPM should add scoping information to the model SOW and should tailor the model, as necessary, to the site and PRPs. In limited circumstances, the PRP or EPA may prepare the SOW after the order is signed, but this approach may lead to major implementation problems and is not preferred.

The Work Plan describes the methodology for accomplishing the objectives set forth in the SOW. Work Plans usually are prepared by the PRPs as the first deliverable specified under the terms of the RI/FS settlement.

References

OSWER Directive 9335.3, "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA," Appendix A, "PRP Participation" (October 1988).

OSWER Directive 9835.8, "Model Statement of Work for PRP-Conducted Remedial Investigations and Feasibility Studies" (June 2, 1989).

K. *Draft Administrative Order*

The terms and conditions governing the RI/FS activities of PRPs should be specified in an Administrative Order on Consent (AOC), which is also known as a consent order. AOCs are the preferred settlement document for RI/FS activities because concurrence on AOCs takes place quickly. CERCLA authorizes the use of AOCs for RI/FS settlements under sections 104 and 122, and does not contain the requirement in section 106 of CERCLA that EPA must make a finding of imminent and substantial endangerment.

The case team should prepare a draft administrative order before special notice is sent. EPA has prepared a model section 106 administrative order, contained in "Guidance Memorandum on Use of Issuance of Administrative Orders Under Section 106(a) of CERCLA," Lee Thomas and Courtney Price, September, 1985. This guidance currently is being revised. A draft model section 104 administrative order on consent is currently being prepared by OWPE, CERCLA Enforcement Division, Guidance and Oversight Branch.

In addition to settlement terms, the AOC must incorporate, by reference, the SOW. The AOC also should contain language that requires PRP conducted RI/FS activities to meet appropriate quality standards. The draft AOC thus provides a starting point for negotiations and should be prepared in time to include it in the special notice to the PRPs.

In addition to the SOW, which outlines the activities to be performed, the AOC also generally contains schedules, EPA or State oversight roles and responsibilities, and enforcement options that may be exercised in the event of noncompliance, such as stipulated penalties. The AOC also typically includes the following elements as agreed upon by EPA and the PRPs:

- **Introduction**: describes parties involved, response action covered, and identifies the site.
- **Jurisdiction:** describes EPA's authority to enter into the Order.
- **Parties bound:** describes to whom the agreement applies and who it binds.
- **Statement of Purpose:** describes the purpose of the Order in terms of mutual objectives in preparing an RI/FS.

Exhibit V-3

Major Components of the SOW

TASK 1: SCOPING

ACTIVITIES:

- Collect and Analyze Existing Site Data
- Document Need for Additional Data
- Project Planning, Including Refinement of Remedial Action Objectives, Documentation of Need for Treatability Studies and Preliminary Identification of Potential ARARs

DELIVERABLES:

- RI/FS Work Plan
- Sampling and Analysis Plan (SAP)
- Site Health and Safety Plan

TASK 2: COMMUNITY RELATIONS

TASK 3: SITE CHARACTERIZATION

ACTIVITIES:

- Field Investigation, Including Implementing Field Support Activities, Defining Site Physical Characteristics, Sources of Contamination and Nature And Extent of Contamination
- Data Analyses
- Data Management Procedures

DELIVERABLES:

- Technical Memorandum on Modeling of Site Characteristics (where appropriate)
- Preliminary Site Characterization Summary Draft Remedial Investigation (RI) Report

TASK 4: BASELINE RISK ASSESSMENT

ACTIVITIES:

- Contaminant Identification and Documentation
- Exposure Assessment and Documentation
- Toxicity Assessment and Documentation
- Risk Characterization
- Environmental Evaluation

DELIVERABLES:

- Technical Memorandum Listing Indicator Chemicals and Hazardous Substances
- Technical Memorandum Describing Exposure Scenarios and Fate and Transport Models
- Technical Memorandum Listing Toxicological and Epidemiological Studies
- Plan for Evaluating Environmental Risk
- Environmental Evaluation Report
- Baseline Risk Assessment Chapter of the RI Report

Exhibit V-3(2)

Major Components of the SOW

TASK 5: TREATABILITY STUDIES

ACTIVITIES:

- Determine Candidate Technologies and the Need for Testing
- Conduct Treatability Testing

DELIVERABLES:

- Technical Memorandum Identifying Candidate Technologies
- Treatability Testing Statement of Work
- Treatability Testing Work Plan (or Amendment to Original)
- Treatability Study SAP (or Amendment to Original)
- Treatability Study Site Health and Safety Plan (or Amendment to Original
- Treatability Study Evaluation Report

TASK 6: DEVELOPMENT AND SCREENING OF ALTERNATIVES

ACTIVITIES:

- Refine and Document Remedial Action Objectives
- Develop General Response Actions
- Identify Volumes or Areas of Media
- Identify, Screen and Document Remedial Technologies
- Assemble and Document Alternatives
- Refine Alternatives
- Conduct and Document Screening Evaluation of Each Alternative

DELIVERABLES:

- Technical Memorandum Documenting Revised Remedial Action Objectives
- Technical Memorandum on Remedial Technologies, Alternatives and Screening

TASK 7: DETAILED ANALYSIS OF ALTERNATIVES

ACTIVITIES:

- Apply Nine Criteria and Document Analysis
- Compare Alternatives Against Each Other and Document Comparison of Alternatives

DELIVERABLES:

- Draft Feasibility Study (FS) Report

TASK 8: OVERSIGHT ACTIVITIES

- **Findings of fact:** provides an outline of facts upon which the agreement is based.

- **Conclusions of Law and Determinations**: specifies that the site is a "facility"; wastes are a "hazardous substance"; and their presence constitutes a release.

- **Notice:** verifies that the State has been notified of pending site activities.

- **Work to be Performed:** describes, generally by reference to the attached SOW, the activities to be conducted pursuant to the AOC and provides a schedule for completion of activities and a schedule of deliverables.

- **Modification of the Work Plan**: specifies that the PRPs are committed to perform any additional work or subsequent modifications which are not explicitly stated in the work plan, if EPA determines that such work is necessary for a complete RI/FS.

- **Quality Assurance:** specifies that technical work at a site must comply with the requirements of CERCLA, the NCP, Agency guidance, and QA procedures.

- **Final RI/FS, Proposed Plan, ROD, Public Comment and Administrative Record Requirements:** provides that EPA releases the RI/FS, prepares the ROD, and that all information upon which the selection of remedy may be based be submitted to EPA for public comment in fulfillment of the Administrative Record requirements of section 113 of CERCLA.

- **Progress Reports and Meetings**: specifies the type and frequency of reporting that PRPs must provide to EPA.

- **Sampling, Access and Data Availability/Admissibility**: stipulates that PRPs shall allow access to the site by EPA, authorized personnel, the State, and third party oversight officials. The clause in the settlement also should state what constitutes the PRPs' best efforts to gain access to the site or necessary off-site locations when the property is not owned by the PRPs. This claim should also provide for access to the site by EPA contractors and specify actions EPA may take to gain access. In developing this clause in the settlement, the case team should consider access needs and the cooperativeness of the parties owning property to which access may be required. This section also stipulates that the PRP shall submit to EPA in the subsequent monthly progress report all results of sampling, modeling, tests, or other data. EPA may take split or duplicative samples as necessary.

- **Designated Project Coordinators**: specifies that EPA, the State, and PRPs shall each designate a project coordinator. The EPA coordinator may be the RPM.

- **Other Applicable Laws**: states that PRPs shall comply with all laws that are applicable when performing the RI/FS.

- **Record Preservation:** specifies that all records must be maintained by both parties for a minimum of ten years after commencement of the remedial action, if any, followed by a provision requiring PRPs to offer the site records to EPA before disposal.

- **Dispute Resolution:** specifies steps to be taken to resolve disagreements between the parties regarding the work to be performed.

- **Delay in Performance/Stipulated Penalties**: provides for stipulated penalties for noncompliance with the terms of the order, and sets forth penalty amounts. This clause in the settlement may also address the applicability of statutory penalties.

- **Force Majeure**: stipulates that the PRPs shall notify EPA of any event that occurs that may delay or prevent work and that is due to force majeure.

- **Reimbursement of Past Costs**: provides for reimbursement for past response costs incurred by the Government.

- **Reimbursement of Response and Oversight Costs:** provides for reimbursement of costs of the Government in connection with the RI/FS, including review and oversight.

- **Reservations of Rights and Reimbursement of other Costs**: provides EPA with the right to enforce past costs and cost reimbursement requirements.

- **Disclaimer**: states that the PRPs' signature on the consent order is not considered an admission of liability.

- **Other Claims:** states that any release from liability applies only to matters covered in the AOC and to no other claim or liability, except as provided in the reservation of rights section.

- **Financial Assurance, Insurance and Indemnification:** specifies that PRPs should have adequate financial resources/insurance coverage to cover liabilities resulting from their RI/FS activities.

- **Effective Date and Subsequent Modification**: stipulates that the consent order is effective on the date it is signed by EPA and that it may be amended by mutual agreement of EPA and the PRPs.

- **Termination and Satisfaction:** states that the consent order shall terminate when the PRP demonstrates in writing that all work has been performed and EPA approves.

RPMs must coordinate closely with ORC in preparing the draft AOC. Region I has developed a step-by-step approach to developing administrative orders, the major points of which are summarized in Exhibit V-4. RPMs should note that the procedures in Exhibit

Exhibit V-4

Region I Procedures for AO Development

1.
RPM and Case Attorney meet to confirm general strategy for issuing the Order and prepare a strategy memorandum for distribution to branch and section chiefs and AO specialists in the program office and ORC.

2.
RPM and Case Attorney collect input on guidance and model orders that may be useful and identify sections from other orders which may be applicable to the objectives of the order under development. A team meeting with all commentors is recommended.

3.
RPM and Case Attorney decide who will be responsible for which parts of the Order, schedule due dates for themselves and assemble, review, and modify the model orders and guidance as appropriate to assure relevance to the site objectives. The Case Attorney submits his or her parts of the Order to the RPM for inclusion in the first draft.

4.
RPM assembles the first draft and circulates the draft to the section chief and other appropriate personnel in the Waste Management Division and ORC. The Order is then redrafted as appropriate for the comments received.

5.
The revised draft, with all attachments, is then circulated to the AO specialists in ORC and the Waste Management Division.

6.
Once comments on the revised draft are incorporated into the AO, the Case Attorney sends a final draft to the potential respondents for negotiation purposes.

7.
The RPM assembles the cover letter, executive summary, press release, final draft Order and all attachments for routing.

8.
The package is routed for signature and concurrence to

- the RPM
- Case Attorney
- ORC quality control specialist
- Section Chief
- Branch Chief
- Division Director
- Deputy Regional Administrator
- Regional Administrator

9.
The State is advised that the Order will be/was issued.

10.
The Order and other related documents are issued and distributed as follows by the RPM:

- Issue original Order to PRPs
- Issue press release
- Issue public comment notice (where applicable)
- Send copies of the Order to the State, EPA Headquarters, OWPE, the Regional Office of Congressional Affairs
- Distribute file copies of the Order to the appropriate Regional personnel.

V-4 are specific to Region I. However, they are included in this handbook as a guide for Regions without an established AO development process and as a source of comparison for Regions with different procedures.

References

OSWER Directive 9335.3, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA," Appendix A, "PRP Participation" (October 1988).

L. *Issue Special Notice Letter*

The Special Notice Letter (SNL) procedure authorized by section 122(e) of CERCLA initiates the formal settlement process between EPA and the PRPs. The special notice procedure triggers a moratorium on EPA's conduct of the RI/FS and remedial action. However, certain investigatory and planning activities may occur during the negotiation moratorium, including any "additional studies" as set forth in section 104(b) of CERCLA. The purpose of the moratorium is to provide for a formal period of negotiation between EPA and PRPs where the PRPs will be encouraged to conduct response activities. The special notice procedure should be utilized whenever it would facilitate agreement. If EPA does not issue a special notice, the Region must provide PRPs with an explanation.

The RI/FS negotiation moratorium may last 90 days if EPA receives a Good Faith Offer (GFO) for conducting the work from PRPs within the first 60 days of the moratorium. The negotiation moratorium concludes after 60 days if the PRPs do not provide EPA with a GFO.

The special notice letter should specify the calendar date through which the moratorium runs. In instances where there is more than one PRP and PRPs are likely to receive the special notice on different days, the date the moratorium begins should be approximately seven days from the date the letters are mailed to the PRPs. In either case, the special notice must make clear when the negotiation moratorium ends.

In cases where EPA decides it is inappropriate to issue the special notice, the Region must notify PRPs in writing of the decision. Section 122(a) of CERCLA requires that the notice indicate the reasons why the Region determined that issuing the special notice and entering into formal negotiations was not appropriate. OWPE has prepared a model notice of decision not to use special notice procedures. This model should be used by the Regions when notifying PRPs that the special notice procedure will not be used. The notice, or justification for not issuing the special notice, should be provided to all PRPs that have been identified to date as well as to the Regional Administrative Record coordinator for placement in the Administrative Record. In any event, a list of PRPs should be provided to the community relations coordinator for inclusion on the mailing list.

In general, EPA policy is to issue special notice letters for RI/FS whenever possible. There are several circumstances where EPA generally would not use the special notice procedure:

- Past dealings with the PRPs strongly indicate they are unlikely to negotiate a settlement

- EPA believes the PRPs have not been negotiating in good faith
- No PRPs have been identified at the conclusion of the PRP search
- PRPs lack the resources to conduct response activities
- Notice letters were issued prior to reauthorization of CERCLA and ongoing negotiations would not benefit by issuance of a special notice.

The RPM also must notify the State of the negotiations and provide the State with the opportunity to participate.

Timing of Special Notice

The special notice should be sent sufficiently in advance of obligations for the RI/FS so that negotiations do not delay the initiation of the RI/FS by the Fund in the event the negotiations do not result in PRP conduct of the RI/FS. At the latest, PRPs should receive special notice 90 days prior to the scheduled date for initiating the RI/FS. The scheduled date for initiating the RI/FS refers to the date the AOC will be signed or the date funds will be obligated to commence response activities. The 90-day period allows an opportunity for the PRPs to undertake the RI/FS while also providing a timeline for initiating Fund-financed RI/FS activity if negotiations do not result in settlement.

M. Good Faith Offer

The initial 60-day moratorium may be extended to 90 days if the PRPs submit a GFO for conducting RI/FS activity. The special notice should identify a GFO as a written proposal that demonstrates the PRP's qualifications and willingness to undertake the RI/FS. A GFO for the RI/FS should contain the following elements:

- A statement of the PRP's willingness to conduct the RI/FS that is consistent with EPA's SOW or work plan and draft AOC and provides a sufficient basis for further negotiations
- A paragraph-by-paragraph response to EPA's SOW or work plan and draft AOC, including a response to any other attached documents
- A demonstration of the PRP's technical capability to undertake the RI/FS, including identification of the firm(s) that may actually conduct the work or a description of the process they will use to select the firm(s)
- A demonstration of the PRP's capability to finance the RI/FS
- A statement of willingness by the PRPs to reimburse EPA for costs incurred in relationship to the PRP's conduct of the RI/FS, including oversight
- The name, address, and phone number of the party or steering committee who will represent the PRPs in negotiations.

If the GFO contains the above elements, and EPA determines that continuing negotiations will be beneficial, the Region may approve a 30-day extension to the negotiation period. Generally, the 30-day extension is utilized only when settlement is likely.

In some cases, it may be beneficial to extend negotiations beyond the 90-day moratorium period. In exceptional circumstances, the Regional Administrator may approve an additional extension of no more than 30 days to the 90-day moratorium. Extensions are granted only in very rare circumstances and for short duration where final agreement is imminent. Requests for extensions to the formal negotiation period should be made in writing by the case team to the Regional Administrator. This request may be prepared initially by the RPM and should specify:

- The length of extension requested
- Status of negotiations (issues resolved and those unresolved)
- Justification for the extension
- Actions to be taken in the event negotiations are unsuccessful.

The Regional Administrator will approve or deny the extension to the negotiation period based on the information presented in the request. If approved, the request then should be forwarded to the Director, OWPE.

Notify DOJ

Under section 122(h)(1) of CERCLA, the Agency may compromise and settle a claim under section 107 of CERCLA for past and future response costs if the case has not been referred to DOJ for further action. In cases where total response costs exceed $500,000 (excluding interest), claims may be compromised (i.e. settled for less than 100 percent) only after approval by DOJ. EPA seldom settles future claims under section 107 of CERCLA because future costs are often unknown and total costs often exceed $500,000. DOJ may review the compromise of a claim pursuant to section 122(h)(1) of CERCLA, where total response costs exceed $500,000 at the facility. DOJ is not required to review an administrative order for PRP conduct of an RI/FS.

N. *Conditions for PRP Conduct of RI/FS*

EPA must evaluate PRP offers against certain criteria to determine whether the PRPs possess the capabilities to perform the RI/FS properly and promptly. RPMs should consider whether the following conditions for PRP conduct of the RI/FS are met:

Scope of Activities

PRPs must agree to follow the site-specific SOW, including reasonable modifications acceptable to EPA, as the basis for conducting the RI/FS. EPA will reject any request for modifications to the SOW that are not consistent with CERCLA, the NCP, and requirements set forth in Agency guidance.

Demonstrated Capabilities

PRPs must demonstrate to EPA that they possess, or are able to obtain, the technical expertise necessary to perform all relevant activities identified in the SOW. PRPs also must demonstrate that they possess the managerial expertise and have developed a management plan sufficient to ensure that the proposed activities will be properly controlled and efficiently implemented. Additionally, PRPs must demonstrate that they possess the financial capability to conduct and complete the RI/FS in a timely and effective manner. While always considered in negotiations, the PRP's demonstration of their technical, managerial, and financial capabilities may be the first deliverable under the settlement.

In addition to the PRP's technical and managerial capabilities, the Agency will have considered the PRP's ability to objectively address certain issues in drafting the order. Tasks which the Agency should pay special attention to and consider reserving for themselves include: risk assessments, determination of applicable or relevant and appropriate requirements, and the effectiveness of institutional controls. In past circumstances, some PRPs have found it to be untenable to acknowledge human health risks.

Assistance for PRP Activities

If PRPs propose to use consultants for conducting or assisting in the RI/FS, the PRPs should specify the tasks to be conducted by the consultants and submit personnel and corporate qualifications of the proposed firms to EPA for review. EPA must verify that the PRPs' consultants have no conflict of interest with respect to the project.

O. Negotiations Outcome - PRP-Lead RI/FS

Negotiations that result in settlement are concluded by signature of an AOC or entry of a Consent Decree (CD) committing the PRPs to conduct of the work and reimburse the Government's costs.

In cases where settlement issues require clarification, the Regional Administrator acts as the primary decision-maker on CERCLA settlement issues. This responsibility is often delegated to the Division Director. The case team should provide a written summary of any settlement issues requiring a decision by the Regional Administrator. The Regional Administrator holds full responsibility for resolving issues related to administrative settlements for the RI/FS.

Once PRPs have signed the settlement document, the agreement must go through the Regional concurrence chain, and ultimately be signed by the Regional Administrator, unless its authority has been redelegated. If the settlement document is a consent decree, the case team also must coordinate with the Environmental Enforcement Section in DOJ, to finalize the settlement. In cases where a GFO is rejected based on the criteria outlined in OSWER Directive 9335.3, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA," Appendix A, "PRP Participation" (October 1988), the case team must determine whether the PRPs are indeed negotiating in good faith, and then determine whether to continue negotiation efforts.

P. *Negotiations Outcome - Fund-Lead RI/FS*

If negotiations do not lead to a signed AOC at the end of the formal negotiation period, EPA may initiate Fund-lead RI/FS activities. However, initiation of Fund-financed activity only is possible if the activity is planned for in the SCAP. A planned date for the initiation of Fund-lead activity may be viewed as a drop-dead settlement date for PRPs, thus providing an incentive for settlement.

While it is preferable not to have uncooperative PRPs conducting the investigatory work of the RI/FS, in limited circumstances section 106 Unilateral Administrative Orders (AOUs) may be issued to achieve PRP conduct of RI/FS activities.

II. PLANNING AND REPORTING REQUIREMENTS

This section discusses the planning and reporting requirements associated with the RI/FS negotiation process.

A. Planning Requirements

Funds for RI/FS negotiations are made available to the Regions through the Case Budget. The Case Budget process is discussed in greater detail in Chapter XVI, Case Budget/Contracts, and Chapter XVII, SCAP/SPMS Cycle. Funds allocated to RI/FS negotiations are set forth in the current fiscal year SCAP manual.

The funds available for RI/FS negotiations cover the following activities:

- Scoping the RI/FS
- Development of the SOW
- Forward planning/records compilation
- Issuance of Special Notice
- Support for negotiations meetings
- Development and issuance of AOs.

This $50k allocation is not designed to support entire scoping activities and work plan development of a Fund-financed RI/FS.

When planning in the SCAP for RI/FS activities, RPMs should consider the advantages and disadvantages of targeting RI/FS activities as Fund or PRP-lead. If a Fund-lead RI/FS is targeted at a site, OERR sets aside extramural dollars to perform the work. In situations where money has already been appropriated for RI/FS activity at a site, EPA may be able to negotiate more effectively with the PRPs, since the possibility exists that EPA may choose to conduct the work immediately and sue for cost recovery later. PRPs generally prefer settling before RI/FS work is completed to avoid being sued for cost recovery at a later time. However, proper planning entails achieving a balance between Fund and RP-lead targeted RI/FSs.

Contractor Support

RPMs should anticipate the extent of contractor involvement in the issuance of the general and special notice letters, development of the SOW, and evaluation of PRP engineering qualifications. Additionally, RPMs should note that separate work assignments must be initiated for RI/FS negotiation and oversight of PRP RI/FS. The initiation of separate work assignments is necessary for tracking and cost recovery of oversight costs.

Section 104 of CERCLA requires EPA to use third party assistance in oversight of PRP-lead RI/FS activities. Generally, this support is available through TES, ARCS, other Federal agencies (such as the Corps of Engineers) or States. Oversight resources are made available through the Case Budget process. At the time of settlement, the

RPM should plan for oversight and identify in-house and extramural support needs. Oversight planning requirements are discussed in greater detail in Chapter VI, RI/FS Implementation. PRPs are required to pay for EPA's costs in connection with the RI/FS including oversight.

B. *Reporting Requirements*

RPMs must provide copies of general and special notices to the Information Management Section of OWPE to ensure data entry into the Superfund Enforcement Tracking System (SETS). Entry into SETS facilitates EPA efforts to track site activities and respond to Congressional and other inquiries. In instances where identical notices are provided to multiple PRPs, it is only necessary to provide one copy of the notice with an attached list of other parties who have received the letter to the Administrative Record Coordinator, State representative, and State or Federal trustee. This procedure notifies the Administrative Record Coordinator, State representative and trustees of the status of negotiations and their opportunity to participate.

SCAP/SPMS

RI/FS negotiations are tracked by SCAP/SPMS through CERCLIS. Exhibit V-5 summarizes SCAP/SPMS measures relevant to RI/FS negotiations. RPMs are responsible for ensuring that an accurate CERCLIS Site Information Form (SIF) is completed for RI/FS negotiations. Exhibit V-6 provides an example of a completed RI/FS negotiations SIF. The RPMs should complete the SIF using the example outline of fields and values:

A. Negotiation type Code/Name (FN = RI/FS Negotiations)
B. Lead (FE = Federal Enforcement)
C. Planned start/complete date (FYQ)
D. Actual start/complete date (MM/DD/YY)
E. SPMS Target Status (P = Primary, A = Alternate)
F. SCAP Note
G. Enforcement Activity Outcome Code/Name
H. Number of PRPs involved in the negotiations
I. Remedy Operable Unit
J. Remedy Type Code (CO1 = RI/FS, FS1 = Feasibility Study, RI1 = Remedial Investigation, system will automatically generate Remedy Name, sequence number is required before system will add record).
K. Financial Requirements:

    1. Financial Type/Code (G = Planned Obligation)
    2. Financial Amount (Amount required for negotiation)
    3. Financial Plan Date (FYQ)
    4. Contract Vehicle (TES = Technical Enforcement Support)
    5. Budget Source (E = Enforcement)
    6. Case Budget Status (ALT = Alternate, APR = Approved)

RI/FS negotiations start when the first special notice letter is issued to the PRPs, when a waiver of special notice is issued, or when the first general notice letter with an expected completion date is issued.

RI/FS negotiations are complete when: 1) an administrative order for RI/FS is issued; or 2) a signed consent decree for RI/FS is referred by the Region to Headquarters or DOJ; or 3) a decision is made to proceed with a Fund-financed RI/FS as indicated by the obligation of RI/FS funds.

At this time an outcome code (G above) should be recorded.

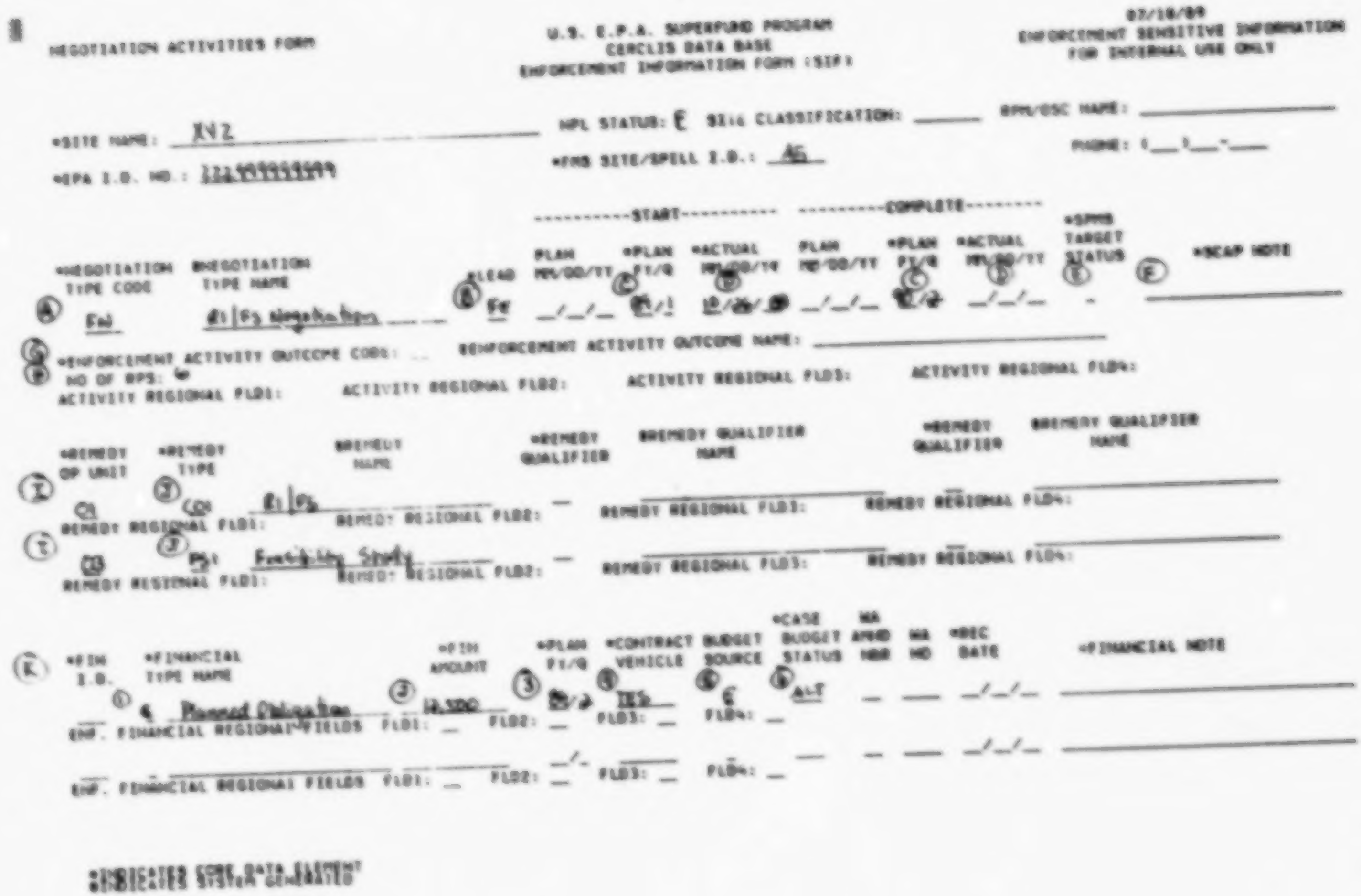
Exhibit V-5

SCAP/SPMS Measures for RI/FS Negotiations

ACTIVITIES	SPMS REPORTING	SCAP PLAN/REPORT	QTRLY	ANNUAL
RI/FS Negotiations Start		X	X	X
RI/FS Negotiations Complete		X	X	X

Exhibit V-6

Sample SIF for RI/FS Negotiations



NEGOTIATION ACTIVITIES FORM

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS DATA BASE
ENFORCEMENT INFORMATION FORM (SIF)

07/10/89
ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
NPL STATUS: F
SI&& CLASSIFICATION: ____
RPM/OSC NAME: ____
*EPA I.D. NO.: [illegible]
*FMS SITE/SPILL I.D.: A5
PHONE: (___)___-____

Ⓐ *NEGOTIATION TYPE CODE	@NEGOTIATION TYPE NAME	Ⓑ *LEAD	START PLAN MM/DD/YY	START Ⓒ *PLAN FY/Q	START Ⓓ *ACTUAL MM/DD/YY	COMPLETE PLAN MM/DD/YY	COMPLETE Ⓒ *PLAN FY/Q	COMPLETE Ⓓ *ACTUAL MM/DD/YY	Ⓔ *SPMS TARGET STATUS	Ⓕ *SCAP NOTE
FN	RI/FS Negotiation	FE	_/_/_	89/1	10/26/89	_/_/_	89/2	_/_/_	-	

Ⓖ *ENFORCEMENT ACTIVITY OUTCOME CODE: __
@ENFORCEMENT ACTIVITY OUTCOME NAME: ____
Ⓗ NO OF RPS: 6
ACTIVITY REGIONAL FLD1: ACTIVITY REGIONAL FLD2: ACTIVITY REGIONAL FLD3: ACTIVITY REGIONAL FLD4:

	*REMEDY OP UNIT	*REMEDY TYPE	@REMEDY NAME	*REMEDY QUALIFIER	@REMEDY QUALIFIER NAME	*REMEDY QUALIFIER	@REMEDY QUALIFIER NAME
Ⓘ	01	Ⓙ CO	RI/FS	—			
Ⓘ	03	Ⓙ FS	Feasibility Study	—			

REMEDY REGIONAL FLD1: REMEDY REGIONAL FLD2: REMEDY REGIONAL FLD3: REMEDY REGIONAL FLD4:

Ⓚ *FIN I.D.	*FINANCIAL TYPE NAME	*FIN AMOUNT	*PLAN FY/Q	*CONTRACT VEHICLE	BUDGET SOURCE	*CASE BUDGET STATUS	MA AMND NBR	MA NO	*REC DATE	*FINANCIAL NOTE
①	4 Planned Obligation	② 12,500	③ 89/2	④ TES	⑤ E	⑥ A+T	_	__	_/_/_	
			_/_				_	__	_/_/_	

ENF. FINANCIAL REGIONAL FIELDS FLD1: _ FLD2: _ FLD3: _ FLD4: _

ENF. FINANCIAL REGIONAL FIELDS FLD1: _ FLD2: _ FLD3: _ FLD4: _

*INDICATES CORE DATA ELEMENT
@INDICATES SYSTEM GENERATED

IV. POTENTIAL PROBLEMS/RESOLUTIONS

This section discusses specific issues the case team may confront during the course of RI/FS negotiations, and suggests methods for resolving these issues.

A. *Stipulated Penalties*

As an incentive for PRPs to properly conduct the RI/FS and correct any deficiencies discovered during the conduct of the agreement, EPA should include stipulated penalties in the terms of the agreement. Penalties should begin to accrue on the first day of the deficiency and continue to be assessed until the deficiency is corrected. The type of violation (i.e., reporting requirements vs. implementation of construction requirements) as well as the amounts per violation per day, should be specified as stipulated penalties in the agreement. Also section 122 allows EPA to seek or impose civil penalties for violations of administrative orders.

B. *Past Costs*

In many cases, EPA has incurred significant costs at a site prior to settling with PRPs for performance or finance of the RI/FS. Such incurred costs may include the conduct of one or more removal actions. EPA must decide whether to pursue recovery of these costs as part of the RI/FS settlement or delay attempting to recover pre-RI/FS costs until RD/RA negotiations. The case team should determine past costs prior to the special notice letter and include them in the letter as a demand. In negotiations, the case team should consider the numbers of settlors/non-settlors, the likely statute of limitations for the removal, the possible implications of cost recovery litigation on remedial activities, and possibilities of reallocation in RD/RA negotiations.

C. *RI/FS Oversight Costs/Limits*

The cost of EPA or State oversight is generally a major issue during RI/FS negotiations. PRPs typically prefer a settlement where their financial responsibility for oversight costs is limited to a fixed dollar amount. EPA generally prefers no limit on the recoverable amount of oversight expenses.

The amount of EPA/State oversight also is often an issue during RI/FS negotiations. PRPs may prefer a settlement where the extent of EPA's presence in the field during PRP conduct of RI/FS activities is predetermined. EPA policy, however, is to not limit the frequency or extent of oversight activities, since conditions may develop that were unanticipated at the time of settlement and require increased attention by the oversight agency. Oversight includes EPA costs, including contractors.

D. *Removals Required During RI/FS*

During the course of the RI/FS, site conditions may deteriorate to the point where removal activity is required. The case team should be prepared for the possibility that a removal may be required during the RI/FS and include provisions for such a situation in the settlement document. RPMs should ensure that appropriate language is incorporated into the AOC or CD to reserve liability for such costs.

E. *Baseline Risk Assessment*

OSWER guidance requires that a baseline risk assessment be performed before a ROD is signed. Performance of the risk assessment may be a significant issue during RI/FS negotiations. Some Regions determine on a site by site basis whether to perform the risk assessment themselves. Other Regions prefer to require PRP preparation of the risk assessment as a standard settlement provision. In Regions that approach this issue on a case-by-case basis, the case team may evaluate the site complexity and the ability and potential of the PRP to prepare an adequate and accurate assessment. The case team should consider the technical capabilities of the PRPs and/or their proposed contractors, the cooperativeness of the PRPs during negotiations, and the potential involvement of the PRPs in the RD/RA when deciding whether to pursue PRP performance of the risk assessment as a settlement provision. A middle ground is to have EPA perform part of the risk assessment. For example, exposure assessment assumptions are somewhat subjective and may be distorted by PRPs or their attorneys. Instead, the model order and SOW could be redrafted to reserve this element for EPA, and on a case-specific basis, allow PRPs to do this work.

F. *Additional Work*

Under the AOC or CD, PRPs agree to complete the RI/FS, including the tasks required under either the original work plan or a subsequent or modified work plan. This may include determinations and evaluations of conditions that are unknown at the time of execution of the agreement. Modifications to the original RI/FS work plan are frequently required as field work progresses. Work not explicitly covered in the initial work plan is often required and therefore provided for in the order. This work is usually identified during the RI and is driven by the need for further information in a specific area. In general, the agreement should provide for fine-tuning of the RI, or the investigation of an area previously unidentified. As it becomes clear what additional work is necessary, EPA will notify the PRPs of the work to be performed and determine a schedule for completion of the work.

EPA must ensure that the clauses for modifications to the work plan are included in the agreement so that the PRPs will carry out the modifications as the need for them is identified. To facilitate negotiation on these points, EPA may consider one or more of the following provisions in the agreement for addressing such situations:

- Defining the limits of additional work requirements
- Specifying the dispute resolution process for modified work plans and additional work requirements (this is particularly difficult if the State is involved)
- Defining the applicability of stipulated penalties to any additional work which the PRPs agree to undertake.

The order may not agree that there will not be an investigation of potential problem areas.

V. REFERENCES

Guidance

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 12, 1987)

OSWER Directive 9335.3-01 "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA," Appendix A, "PRP Participation" (October 1988)

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987)

OSWER Directive 9835.8, "Model Statement of Work" (June 2, 1989)

Manuals

OSWER Directive 9355.1-1, Superfund Federal Lead Remedial Project Management Handbook (December, 1986)

OSWER Directive 9375.1-4-d, State Participation in the Superfund Program, Appendix D, "Procedures for Implementing Intergovernmental Review for the Superfund Program" (June 2, 1988)

Contacts

Administrative Orders and Consent Decrees

OECM, CERCLA Branch, at FTS 382-3077

OWPE, CERCLA Enforcement Division, Compliance Branch, Settlement Section, at FTS 382-4838

Model AOC for RI/FS

OWPE, CERCLA Enforcement Division, Guidance and Oversight Branch, at FTS 382-5646

Special Notice Procedures and Model Letters

OWPE, CERCLA Enforcement Division, Compliance Branch, Settlement Section, at FTS 382-4838

OWPE, CERCLA Enforcement Division, Guidance and Oversight Branch at FTS 475-6770

Model SOW

OWPE, CERCLA Enforcement Division, Guidance and Oversight Branch, at FTS 382-5646

VI. ACTIVITIES CHECKLIST

This activities checklist is not intended to provide an exhaustive list of procedures. RPMs should use it as a guide when involved in RI/FS negotiations.

1)_____ Decision to start the RI/FS
    a)_____ Is the RI/FS start planned in the SCAP?
    b)_____ Initiate intergovernmental review process

2)_____ Form Case Team
    a)_____ Review PRP Search and identify follow-up work
    b)_____ Begin developing negotiation plan

3)_____ Information exchange/general notice
    a)_____ Issue information request letters
    b)_____ Issue general notice letters
    c)_____ Encourage formation of PRP steering committee
    d)_____ Complete follow-up work identified during PRP search review
    e)_____ Notify State and Natural Resource Trustees of negotiations

4)_____ Scoping
    a)_____ Develop site objectives
    b)_____ Develop site management strategy

5)_____ Negotiation Preparation
    a)_____ Develop SOW
    b)_____ Develop draft AO

6)_____ Formal Negotiations
    a)_____ Issue special notice letters
    b)_____ Evaluate good faith offer
    c)_____ Request negotiation extension, if appropriate

7)_____ Conclude negotiations

    a)_____ Prepare AO for signature

    b)_____ Initiate Fund-financed activity, if appropriate

Appendix

Remedy Selection and Negotiation Plan

1)_____ Schedule and Staffing Requirements

  a)_____ Provide a schedule for completing the negotiations (including activities, staff and contractor support)

  b)_____ Describe coordination with State and other government offices

2)_____ Negotiation Objectives

  a)_____ Develop initial and bottom-line negotiation positions

  b)_____ Assess the desirability of a PRP RI/FS relative to site and PRP history to date

  c)_____ Identify potential for alternative settlements, including mixed funding, de minimis or partial settlements (usually for RD/RA)

3)_____ Costs Incurred and Cost Recovery Plan

  a)_____ Summarize costs incurred to date and estimate future response costs at the site

  b)_____ Develop negotiation strategy for cost recovery, including the degree of compromise available on past and oversight costs and the linkage between recovery of past and oversight costs and PRP performance

  c)_____ Describe the methods used to document costs for the site and identify sources for cost documentation requests

  d)_____ Assess timing of demand, considering statute of limitations, etc.

4)_____ Remedy Selection Process

  a)_____ Discuss the methodology used in selecting a site remedy (identifying participants in RI/FS review; ROD preparation; PRP and public participation in the process; and compilation, review, updating and certification of the Administrative Record)

  b)_____ Indicate how remedy selection affects the RD/RA negotiation process

5)_____ Criteria For Good Faith Offer

    a)_____ Include PRPs willingness to conduct or finance site clean-up activities and reimburse EPA for oversight activities, response to EPA's statement of work, demonstration of PRP capabilities, etc.

6)_____ Enforcement Prerequisites

    a)_____ Discuss the progress made in identifying PRPs and PRP willingness to cooperate with the government

    b)_____ Assess enforcement potential including determination of imminent and substantial endangerment, strength of evidence/liability, financial viability of PRPs, etc.

    c)_____ Assess use of enforcement tools including special notice, unilateral actions, actions against recalcitrants, etc.

7)_____ Technical Requirements For PRP Performance

    a)_____ Develop scope of work or work plan

    b)_____ Describe key items required to conduct PRP oversight

    c)_____ Assess the site access situation

8)_____ Draft Administrative Order (AO) or Consent Decree (CD), as appropriate

RI/FS IMPLEMENTATION

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
RI/FS Overview 1
    Phases of RI/FS Activity 2
        Scoping the RI/FS 2
        Site Characterization and Baseline Risk Assessment 2
        Treatability Investigations 3
        Development and Screening of Alternatives 3
        Detailed Analysis of Alternatives 3
Oversight Objectives 3
Roles and Responsibilities 4
    RPM 4
    Oversight Assistant 6
    Natural Resource Trustees 7
    ATSDR 7

II. PROCEDURES AND INTERACTIONS 8

A. Project Scoping 8
    Preliminary Scoping 8
    Scoping After Agreement 9
    Work Plan 10
        Sampling and Analysis Plan (SAP) 10
        Health and Safety Plan 10
B. Site Characterization 11
    Collection and Analysis of Field Data 11
C Risk Assessment 12
D. Treatability Investigations 14
E. Development and Screening of Alternatives 15
F. Detailed Analysis of Alternatives 16

III. PLANNING AND REPORTING REQUIREMENTS 18

A. SCAP/SPMS 18
B. Site Information Form (SIF) 18
C. Budget 19

IV. POTENTIAL PROBLEMS/RESOLUTIONS 20

A. Dispute Resolution 20
B. Corrective Measures 20

V. REFERENCES 21

Regulation 21

Guidance 21
Manuals 21
Training 22
Contacts 22

VI. **ACTIVITIES CHECKLIST** 23

Preparation and Management 23
Community Relations Plan 23
Project Planning 23
Oversee RI Field Work and Data Analyses 27
Perform or Oversee Risk Assessment 29
Remedial Investigation Report 29
Treatability Testing 30
Development and Screening of Alternatives 30
Detailed Analysis 31
Feasibility Study 31

APPENDIX

RI/FS IMPLEMENTATION

I. DESCRIPTION OF ACTIVITY

Introduction

The focus of this chapter is on the RPM's role in overseeing the implementation of a PRP-conducted RI/FS. To put the oversight responsibilities in context, a summary of the RI/FS process is also provided.

A PRP-conducted RI/FS is usually authorized by an administrative order under sections 104 and 122 of CERCLA and may be ordered unilaterally under section 106. It is EPA's policy to allow the PRP to conduct the RI/FS when the PRP:

- Is technically qualified or otherwise capable of performing the necessary activities within the time constraints
- Agrees to conduct the RI/FS in accordance with the terms and conditions of the administrative order or consent decree
- Reimburses the Superfund for all EPA and qualified oversight assistant costs associated with oversight of the project.

Actual PRP implementation of the RI/FS begins after the administrative order is signed. The process is complete once the Agency conducts a closeout meeting, approves the final RI/FS report as submitted by the PRPs or as amended by the Agency, and issues the Record of Decision (ROD).

RI/FS Overview

In general, the RI/FS is an investigation designed to characterize the site, assess the nature and the extent of the contamination at a site, evaluate the potential risk to human health and the environment, and develop and evaluate potential remedial alternatives. An RI/FS accomplishes two primary objectives:

- Provides information to assess the risks posed by the site
- Evaluates a range of remedial alternatives (engineered solutions) based on specified criteria.

The process is phased, and is composed of the RI, which is the actual data collection and risk assessment process (corresponding to the first objective), and the FS, which develops and evaluates remedial alternatives. The RI and FS include iterative activities and overlap in timing. Data collected in the RI influences the development of remedial alternatives in the FS, which in turn affects the data needs and the scope of treatability studies. The distinction between the RI and FS phases is made to emphasize the focus of the study.

The specific tasks required to perform an RI/FS vary, and are phased in accordance with a site's complexity and the amount of available information. A phased process facilitates early identification of data collection requirements. These requirements are intended to characterize the site effectively by describing contaminant concentration contours, fate and transport, and exposure pathways so that sufficient information is available to evaluate and compare the remedial alternatives.

Phases of RI/FS Activity

There are five major phases of RI/FS activity. Each phase is briefly summarized below and graphically depicted in Exhibit VI-1.

Scoping the RI/FS

Scoping is a process that is completed through:

- Preliminary planning within EPA and State agencies
- Negotiations with PRPs
- EPA review of project plans submitted by the PRPs after signing an order with EPA

During the preliminary planning phase prior to negotiations between EPA and the PRPs, EPA identifies potential sources of contamination, pathways, and receptors. The Agency then establishes site-specific objectives of the RI/FS and a strategy for the general management of the site. The scope should insure that the objectives of the RI/FS are as clear as possible, there is sufficient understanding of the desired work to negotiate a statement of work, and resource needs can be defined.

Specific tasks and deliverables, as well as a schedule, usually will be identified in the context of negotiations with the PRPs on the statement of work as part of a consent order. After an order between EPA and the PRPs for performance of the RI/FS is signed, the pre-RI/FS project scope will be defined in the approved work plan, which usually is developed by PRPs, subject to EPA's approval. Many of the activities begun during the scoping process are continued and refined as site work progresses and new information is obtained.

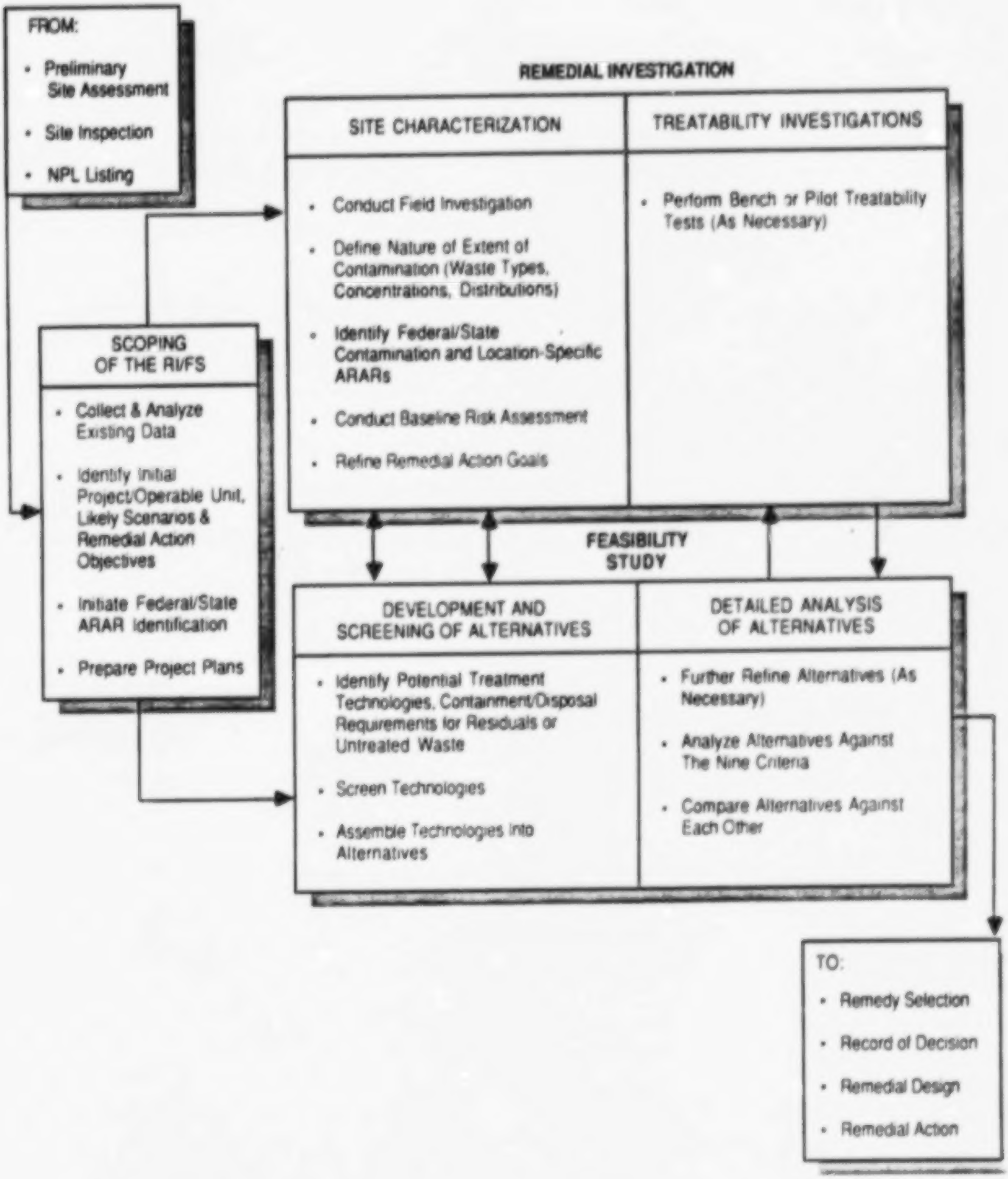
Site Characterization and Baseline Risk Assessment

The objective of this process is to provide information to determine the extent of the public health and environmental threat posed by the site. This process is composed of two major components. The first involves the collection and analysis of field data to determine the physical site characteristics, sources of contamination, and nature and extent of contamination. The second involves the development of a baseline risk assessment.

The purpose of the baseline risk assessment is to characterize the current and potential risk that the site poses to human health and the environment. The results of the baseline risk assessment may indicate that the site poses substantial, little or no threat, and that substantial, limited, or no further response activity is required. If the baseline risk assessment indicates that action is necessary, the assessment is revised (appended)

Exhibit VI-1

Phased RI/FS Process


FROM:
• Preliminary Site Assessment
• Site Inspection
• NPL Listing
REMEDIAL INVESTIGATION
SITE CHARACTERIZATION
• Conduct Field Investigation
• Define Nature of Extent of Contamination (Waste Types, Concentrations, Distributions)
• Identify Federal/State Contamination and Location-Specific ARARs
• Conduct Baseline Risk Assessment
• Refine Remedial Action Goals
TREATABILITY INVESTIGATIONS
• Perform Bench or Pilot Treatability Tests (As Necessary)
SCOPING OF THE RI/FS
• Collect & Analyze Existing Data
• Identify Initial Project/Operable Unit, Likely Scenarios & Remedial Action Objectives
• Initiate Federal/State ARAR Identification
• Prepare Project Plans
FEASIBILITY STUDY
DEVELOPMENT AND SCREENING OF ALTERNATIVES
• Identify Potential Treatment Technologies, Containment/Disposal Requirements for Residuals or Untreated Waste
• Screen Technologies
• Assemble Technologies Into Alternatives
DETAILED ANALYSIS OF ALTERNATIVES
• Further Refine Alternatives (As Necessary)
• Analyze Alternatives Against The Nine Criteria
• Compare Alternatives Against Each Other
TO:
• Remedy Selection
• Record of Decision
• Remedial Design
• Remedial Action

with an evaluation of how each alternative carried through to the detailed evaluation addressed the risk(s).

Treatability Investigations

Treatability studies should provide sufficient data in a timely manner to adequately evaluate treatment alternatives during the detailed analysis in the FS. RPMs should identify and encourage the PRPs to identify the need for treatability testing as early in the RI/FS process as possible. If remedial actions involving treatment have been identified by either EPA or the PRPs, the RPM should determine the need to conduct treatability studies. Testing of the most promising treatment technologies is often necessary to assess their effectiveness.

Development and Screening of Alternatives

Alternatives developed represent a range of response actions that, with the exception of the no action alternative, are protective of human health and the environment and meet ARARs or qualify for a waiver. The range must include treatment options. Under some circumstances, such as when the site is a municipal landfill, developing a complete range of alternatives may not be practical. If site-specific conditions warrant the omission of a full range of alternatives, RPMs should ensure that the rationale for reaching this decision is well documented.

Detailed Analysis of Alternatives

During the detailed analysis, each alternative is assessed against specific evaluation criteria. The PRPs should present the results of this assessment in a format that allows the RPM to make reasonable comparisons between alternatives. By making these comparisons, the RPM can identify trade-offs among the various alternatives. Appendix F of OSWER Directive 9355.3-01 "Guidance for Conducting Remedial Investigations and Feasibility Studies Under CERCLA" (October 1988) contains sample formats for arranging detailed analysis of alternatives.

Oversight Objectives

Under section 104(a)(1) of CERCLA, the Agency is responsible for providing oversight of PRP-conducted RI/FS. The RPM has primary responsibility for managing RI/FS oversight.

The nature of oversight activity at a particular site depends upon the technical complexity of the site and possible remedies, the nature of the work being done, the Agency's level of confidence in the PRP's technical competence and, during the course of the project, the PRP's demonstration of quality work. In general, the RPM is responsible for accomplishing four primary objectives:

- Verifying that the work complies with the Administrative Order (AO), the Statement of Work (SOW), work plan and Sampling and Analysis Plan (SAP)

- Verifying that the RI/FS complies with CERCLA, the NCP and relevant Agency guidance

- Verifying that all work is performed according to generally accepted scientific and engineering methods
- Verifying that sufficient data is being collected and analyzed to enable EPA to identify site risks, develop alternatives, select a preferred remedial alternative and write the ROD.

Achievement of these objectives depends, in part, upon the terms of the agreement between EPA and the PRP, guidance and direction provided to the PRP, and effective project review.

The agreement between EPA and the PRP will not be discussed in this chapter since it is covered in Chapter V, RI/FS Negotiations/Settlement. However, it is important to remember that the preliminary scoping conducted prior to negotiations, the PRP's qualifications, and the terms of the agreement establish a framework affecting oversight during the actual conduct of the RI/FS.

The RPM should provide as much guidance to the PRPs as possible concerning the RI/FS process. Relevant EPA guidance documents and examples of deliverables are appropriate materials that should be provided. Guidance and expectations concerning format, technical content, mechanisms for incorporating Agency comments, and schedule of deliverables must also be clearly communicated. Frequent meetings with the PRPs during the course of the RI/FS facilitate PRP implementation that will satisfy Agency criteria.

Finally, the RPM must effectively manage the project to meet the RI/FS objectives within time constraints. To effectively manage the project, the RPM, with contractor support, must review all deliverables and oversee the on-going site activities of the PRP-conducted RI/FS. The level of oversight (i.e. frequency of site visits, number of split samples) should be determined site-specifically based on technical considerations (i.e. treatability studies, use of innovative technologies, presence of hydrogeologic anomalies or contaminants of special concern) and Agency expectations related to the quality and timeliness of PRP field work, laboratory analysis, and deliverables.

Roles and Responsibilities

Following is a summary of the primary roles and responsibilities of the RPM, oversight assistant, Natural Resource trustees and ATSDR during the RI/FS. Appendix A of this chapter contains exhibits which detail roles and responsibilities through the five RI/FS phases.

RPM

The RPM has the primary responsibility for overseeing all response activities. Prior to the signing of the agreement between EPA and the PRP, the RPM will:

- Identify the preliminary scope of RI/FS activity
- Coordinate with the State and, as appropriate, other agencies (e.g., DOI, NOAA, ATSDR) on scoping

- Identify the site-specific activities and deliverables required from the PRP
- Provide a project schedule for the administrative order
- Assure necessary Regional management review and approval of scoping decisions, activities, schedule, etc.
- Identify persons/agencies/extramural resources with particular expertise that will provide technical review of activities and deliverables (these mechanisms should also be used for scoping) and agree to the scheduled time frames
- Budget intramural and extramural resources to support the project and finalize associated paperwork
- Verify that the planned activities will meet statutory requirements and satisfy the RI/FS objectives.

Typically, the RPM will perform the following during the RI/FS:

- Conduct scheduled and unscheduled site inspections in conjunction with the oversight assistant
- Monitor PRP adherence to the agreement; consult with counsel
- Review all PRP and oversight assistant deliverables to assure quality and provide related technical comments
- Obtain internal EPA input on specialized matters (e.g., ground water, contaminants, bedrock)
- Meet with the PRPs periodically to communicate the Agency's requirements and discuss progress, including good work and deficiencies in the work, and needed work
- Maintain Agency schedule for reviewing deliverables or meeting any other deadlines
- Assure that any aspects of the RI/FS performed by EPA are done (e.g., in some instances the risk assessment or ARAR analysis)
- Manage intramural and extramural resources
- Maintain communication with the State throughout the RI/FS process with an emphasis on understanding State perspective, identifying ARARs, and coordinating community relations
- Coordinate intergovernmental interactions

- Assure EPA management review at major stages (e.g., work plan, draft RI, proposed plan, ROD)
- Conduct community relations activities, with assistance of the community relations coordinator
- Maintain the site file, including cost recovery documentation
- Establish and update periodically the Administrative Record in conjunction with ORC
- Finalize any supplements to the RI/FS and write the proposed plan and ROD
- Provide monthly updates of budget and project schedule information in CERCLIS in coordination with Regional Information Management Coordinator (IMC).

Oversight Assistant

Under section 104(a)(1) of CERCLA, EPA must procure the services of a qualified person to assist the Agency in overseeing PRP-conducted activities. The oversight assistant's role is to provide assistance to the RPM in overseeing PRP-conducted RI/FS enforcement activities. The RPM should use discretion in determining the roles and responsibilities of the oversight assistant.

Responsibilities that the RPM may assign to the oversight assistant include:

- Assisting in planning of project scope and schedule.
- Monitoring PRP field activities to verify performance in accordance with the agreement with the PRPs and generally accepted scientific and engineering methods.
- Reviewing deliverables submitted by the PRPs.
- Conducting quality assurance tasks.
- Conducting the risk assessment.
- Drafting any necessary supplements to the RI/FS for Agency finalization.
- Conducting contingency planning to protect human health and the environment in the unexpected event of an emergency.
- Assisting in the reproduction of documents for the Administrative Record in the Regional office and at the site. (Decisions on what documents to include are made by the RPM in conjunction with Regional counsel).
- Preparing and assisting in the implementation of community relations deliverables and tasks.

- Providing site-specific information to the Regional IMC for input into CERCLIS.

Procurement of the oversight assistant's service is typically obtained through Technical Enforcement Support (TES) and the Alternative Remedial Contracts Strategy (ARCS) contracts.

The RPM may also seek assistance in executing his/her oversight responsibilities from the Department of the Interior (U.S. Fish and Wildlife Service and U.S. Geological Survey) and the Department of Defense (U.S. Army Corps of Engineers) (COE), among other Agencies.

The oversight assistant should perform tasks in a professional and non-confrontational manner. There are limitations on the oversight assistant's authority. The oversight assistant should not advise or issue directions regarding, or assume control over, any aspect of the RI/FS when communicating with the PRPs. The RPM should control the amount of direct communication between the oversight assistant and the PRPs. The oversight assistant has no authority to allow deviations from the site agreement, which includes the work plan, or any other project plans. Any deviations must be approved by the RPM.

Natural Resource Trustees

The natural resource trustees are responsible for assessing damages to natural resources within their domain. The Federal assessment begins with Preliminary Natural Resource Surveys (PNRS) which are typically initiated at the beginning of the RI/FS process. The surveys are designed to assist the Agency in reaching comprehensive settlements of all Federal natural resource claims under CERCLA. PNRSs are conducted by the National Oceanic and Atmospheric Administration (NOAA) only in those Regions with coastal resources and by the Department of the Interior (DOI) in all other EPA Regions. Both DOI and NOAA will conduct a survey of the natural resources for which they act as trustees once they have been contacted by the RPM. In addition, States have trusteeship responsibilities. RPMs should confirm with Regional management procedures for notifying the trustees.

ATSDR

Under section 104(j)(6) of CERCLA, the Agency for Toxic Substances and Disease Registry (ATSDR) must perform a health assessment for all NPL sites. This assessment must be performed within one year of the site's proposed listing. The ATSDR's health assessment is intended to determine the potential risks to human health posed by the site.

After a site is proposed for listing on the NPL, the RPM should send the preliminary assessment and site inspection report to the ATSDR and maintain information exchange with them. However, RPMs must be cognizant of the fact that ATSDR may not withhold site-related draft documents requested by the public. Therefore, RPMs must be careful not to release confidential or enforcement-sensitive documents to ATSDR. RPMs are responsible for reviewing and commenting on the draft Health Assessment provided by the ATSDR. Data collected during the RI activities and reports generated as a result of that data collection also should be forwarded to ATSDR.

II. PROCEDURES AND INTERACTIONS

This section summarizes the process and deliverables associated with each phase of RI/FS activity. The specific procedures to follow in performing RI/FS oversight will be described in OWPE's forthcoming "Draft Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies."

A. *Project Scoping*

Scoping is the planning phase of the RI/FS process. Project scoping for a site where it is anticipated that the PRP will conduct the RI/FS occurs in two phases: before and during RI/FS negotiations, and after the PRP has signed an agreement with EPA. RPM responsibilities during each of these phases of project scoping also are discussed in Section I of this chapter.

Preliminary Scoping

Prior to the negotiations, the RPM begins defining the technical and administrative scope of the pending RI/FS and the requisite oversight.

It is helpful for the RPM to sketch out a rough conceptual model of the site, including:

- Source areas
- Contaminants
- Possible extent of migration
- Media of concern
- Pathways
- Possible receptors
- Possible risks
- Possible acceptable contaminant ranges
- Possible remedies.

The RPM should ascertain what information is required to delineate these matters. Following general identification of this information, specific data needs should be defined. The RPM then needs to develop specific instructions to add to the model statement of work to assure that necessary data are gathered. In particular, the site-specific objectives and general management strategy should be added to the model SOW.

It is particularly important that the statement of work be as specific as possible about what is needed in the work plan, but it should not be so specific as to limit generally required work. The RPM should decide whether EPA will perform specific tasks (e.g., the risk assessment). The RPM should also keep in mind that Technical Assistance Committees (TACs), which are internal EPA resources, and contractor support can and should be used during preliminary scoping.

Preliminary information that is used to develop the technical scope includes (1) existing technical information, and (2) determination of decision points in the process and corresponding data needs.

Administratively, the RPM should (1) initiate and maintain information exchange with other Federal and State agencies, (2) identify enforcement concerns and provide technical information to Regional counsel for use in planning and conducting negotiations, (3) plan for intramural and extramural resources and initiate associated paperwork, (4) procure an oversight assistant before the order is finalized to prevent unnecessary delays, and (5) develop a community relations plan with the community relations coordinator.

At this time, the RPM should also begin identifying oversight and review functions and time frames. The RPM, in conjunction with the Section/Unit Chief, determines what oversight activities are to be performed by TES or ARCS contractors or by other government entities. One of the initial oversight activities that occurs during this phase is EPA's assessment of the PRP's ability to conduct the RI/FS as demonstrated in their Good Faith Offer (GFO) submitted within 60 days of the issuance of special notice. This oversight activity is discussed in Chapter V, RI/FS Negotiations. Another oversight planning activity is the scheduling of regular meetings with the PRPs that commence after an agreement has been reached.

Scoping After Agreement

Once the Administrative Order has been signed by EPA and the PRP, the RPM should:

- Conduct a project initiation meeting and site visit with the PRP and if procured, the oversight assistant
- Coordinate interagency and intergovernmental responsibilities and support functions, (e.g. natural resource trustees, COE, etc.)
- Review PRP project plans
- Implement the community relations plan. Any PRP participation in community relations activities is controlled by EPA.

The required deliverables for the scoping process include a work plan, sampling and analysis plan, and a health and safety plan.

It is very important to communicate with the PRPs at the beginning of the process to enhance prospects for quality work. At a meeting, the RPM should assure that the PRPs understand the applicable guidances and that they understand what EPA expects of them in the RI/FS.

The RPM is responsible for coordinating review of project plans and for final approval of those plans. PRP-conducted RI/FS activity cannot be initiated until the RPM approves the plans. The RPM may conditionally approve sequential portions of project plans so that revisions concerning activities scheduled later in the project do not adversely impact the schedule of earlier activities. Conditions to the approval must be specific. Conditional approvals should be reviewed by the Section/Unit Chief.

In addition, due to the uncertainties associated with sites, it may be necessary to modify or supplement the initial plans. The RPM must review and approve any modifications in writing.

Work Plan

The PRP's work plan expands the tasks of the Statement of Work (SOW) by detailing the work to be done in conducting the RI/FS.

The draft work plan is generally submitted by PRPs after the Administrative Order (AO) is signed. It must direct in detail the activities and deliverables specified in the SOW, including a schedule for all activities. Together with the Sampling and Analysis Plan (SAP), it assures that PRPs gather all information and do the analyses needed in an RI/FS and for a ROD. Thus, it is important for the work plan to be carefully reviewed by the RPM. The draft work plan may also be reviewed by the natural resource trustees and other divisions (programs) within the Regions, including the Quality Assurance Office (QAO). The aspects of the RI/FS that must be delineated in the work plan are described in the model SOW, which is discussed in Chapter V, RI/FS Negotiations/Settlement and also in this chapter. Once a work plan has been incorporated by reference into the AO, the RPM must ensure that the plan is available for public review as part of the site file and the Administrative Record file.

Sampling and Analysis Plan (SAP)

The SAP details the procedures that the PRP plans to implement for conducting all field activities. It has two components: a field sampling plan (FSP) and a quality assurance project plan (QAPP). The FSP provides a detailed description of all RI/FS sampling and analytical activities. In some Regions, it may be part of the Work Plan. The QAPP describes the quality assurance and quality control protocols necessary to achieve required data quality objectives. Data quality objectives (DQOs) are established and assure that the analyses are performed with sufficient detection limits to identify relatively low but significant concentrations of contaminants and to assure that sufficient data are gathered. A pre-QAPP meeting is held between PRPs, PRP contractors and laboratory representatives, the RPM, QAO representatives, and the oversight assistant. The RPM should review the QAPP and FSP with the Environmental Services Division (ESD) to determine whether the PRP plans can achieve the data quality objectives.

Health and Safety Plan

The health and safety plan describes any special training, supervision, procedures, and protective equipment needed by field personnel. EPA reviews the plan to ensure that it provides for the protection of human health and the environment, but does not "approve" the PRP's health and safety plan. PRPs must comply with Occupational Safety and Health Administration (OSHA) requirements.

Exhibits VI-2 and VI-3 portray RI/FS oversight activities during the scoping phase and the other RI/FS phases.

B. *Site Characterization*

The objectives of this phase are to define the site characteristics, the source(s) of contamination, the nature and extent of contamination, and to determine possible fate and transport of contaminants as preparation for determining site risks. The major components are collection of field data, analyses of data and report preparation.

Collection and Analysis of Field Data

As an approach, RPMs may suggest that the PRPs direct their initial field data collection effort to developing a general understanding of the site. Once this understanding is achieved, RPMs should confirm that the PRPs focus more extensive efforts on filling gaps in the data. Implementing a phased sampling approach may ensure the efficient collection of data.

RPMs must have the PRPs establish the quality of old data through reliable means. Data quality objectives apply to all data--old and new. The required technical memorandum documenting the need for additional data should include the analysis and meaning of old data as the basis for establishing what additional data is needed.

It is imperative that the site characteristics, including physiography, geology, hydrogeology, and hydrology, be defined. This foundation is critical to subsequent defining of potential transport pathways. In addition, data gathered during site characterization are used in treatability analyses and in analysis of remedial alternatives.

Determination of the location of each source is often difficult, particularly at old sites. Aerial photographs from historical files and interviews often provide helpful insights. For each location, the area and depth of contamination are usually determined at incremental depths on a grid. Data on contamination are often gathered at various depths to show concentration gradients to health-based levels. It is important to gather data to define principal threat areas and volumes that may warrant treatment. It is also important to gather material for contaminant mobility, leaching and treatability testing.

The RPM must assure that the PRP provides notice of the planned dates for field activities at least two weeks in advance. During the PRP conduct of field activities, the RPM must assure that the PRPs collect sufficient information at the proper locations and follow QA/QC procedures. The oversight assistant should keep accurate records of site activities. This can be accomplished, in part, by having the PRP and the oversight assistant use:

- Field activity reports
- Field logbooks
- Photographic logs.

Field activity reports may include a checklist to remind the oversight assistant of the critical elements of the field activities and as a convenient means for documenting field activities. Samples of field activity reports are provided in the appendix of OSWER Directive 9835.3, "Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies" (to be issued). Field activity reports should be used in conjunction with the SAP. By combining these two reporting tools, the oversight assistant will have a valuable tool to remind him/her of site-specific planned activities. These combined reports may also enable the oversight assistant to keep an accurate record of site activities that are not conducted according to plans.

Oversight assistants usually maintain an activity logbook. The logbook generally includes: records of pertinent conversations with either the PRP or its contractor, a list of potential or actual problems encountered at the site, an explanation for changes to the work plan, and a record of any field activities not included in the field activity reports as well as a description of daily activities and contacts with the public or press.

A photographic record of field activities may also be a useful tool for documenting field work for PRPs as well as the oversight assistant. If the oversight assistant elects to use this tool, he/she should keep detailed information about the location, date, time and subject matter of each photograph.

If the RPM has not received sampling data within a month of analysis by the PRP's laboratories, he/she should contact the PRPs to determine the reason for the delay.

In addition to the progress meetings, reports, technical memoranda, and data summaries, the required deliverables for the site characterization process include the preliminary site characterization summary and, once the baseline risk assessment is complete, the draft Remedial Investigation (RI) report.

The preliminary summary is prepared after the results from sampling efforts are available. It provides information on contamination at various locations and depths, including contaminants of concern and associated concentrations. It may also include fate and transport projections. It also provides information for the risk assessment and a reference for the RPMs to ensure that appropriate alternatives are being developed by the PRPs. The summary may be used to provide ATSDR with data to use in preparing health assessments. RPMs should assure that the data satisfy QA/QC requirements and are accurately displayed.

The draft RI report documents the data collection and analysis and supports the FS.

C. Risk Assessment

A baseline risk assessment, which may be referred to as an endangerment assessment, is conducted during the RI. Regional management will use the baseline risk assessment to determine whether, in the absence of remedial action, a particular site poses a substantial danger to public health and welfare and the environment. There are two separate inquiries: human health and the environment.

The baseline risk assessment process is cumulative in nature: the components of the assessment build on one another. The RPM should assure that the PRPs have copies of

Exhibit VI-2

Overview of RI/FS Oversight Activities During Scoping

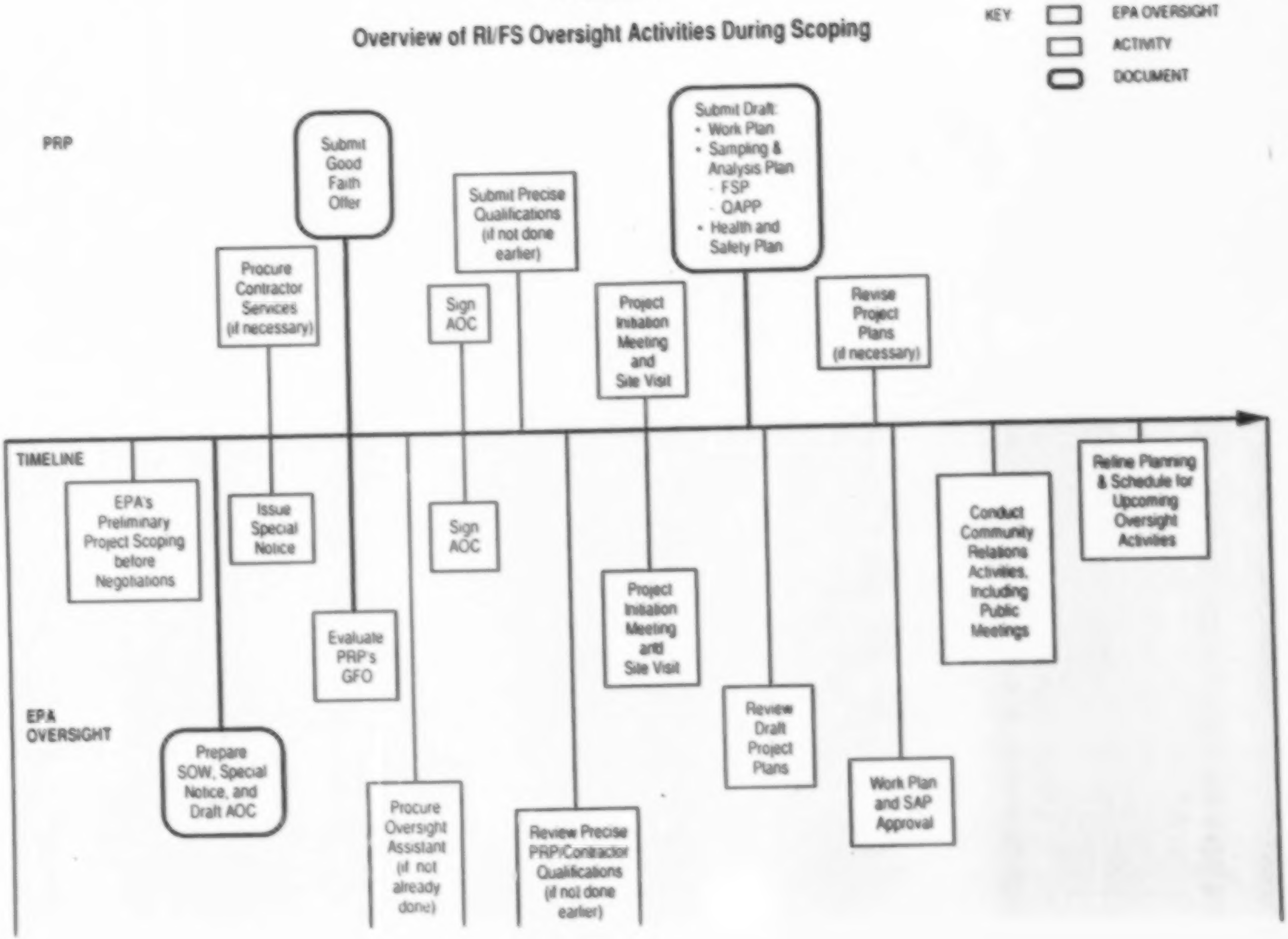
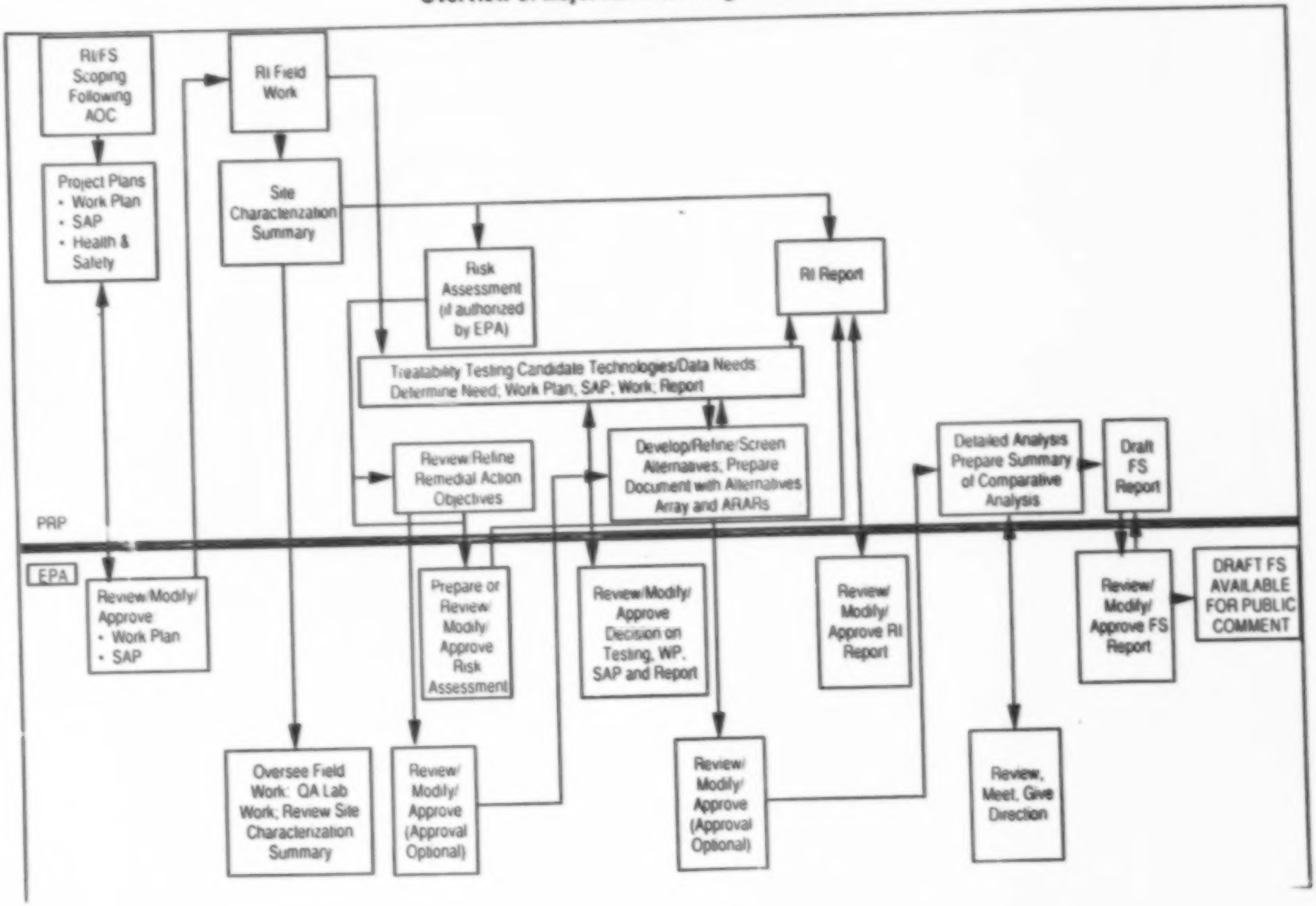

KEY
EPA OVERSIGHT
ACTIVITY
DOCUMENT
PRP
Submit Good Faith Offer
Procure Contractor Services (if necessary)
Submit Precise Qualifications (if not done earlier)
Sign AOC
Project Initiation Meeting and Site Visit
Submit Draft:
• Work Plan
• Sampling & Analysis Plan
- FSP
- QAPP
• Health and Safety Plan
Revise Project Plans (if necessary)
TIMELINE
EPA's Preliminary Project Scoping before Negotiations
Issue Special Notice
Sign AOC
Evaluate PRP's GFO
EPA OVERSIGHT
Prepare SOW, Special Notice, and Draft AOC
Procure Oversight Assistant (if not already done)
Review Precise PRP/Contractor Qualifications (if not done earlier)
Project Initiation Meeting and Site Visit
Review Draft Project Plans
Work Plan and SAP Approval
Conduct Community Relations Activities, Including Public Meetings
Refine Planning & Schedule for Upcoming Oversight Activities

Exhibit VI-3

Overview of Major RI/FS Oversight Activities



RI/FS Scoping Following AOC
Project Plans
• Work Plan
• SAP
• Health & Safety
RI Field Work
Site Characterization Summary
Risk Assessment (if authorized by EPA)
RI Report
Treatability Testing Candidate Technologies/Data Needs: Determine Need; Work Plan, SAP; Work; Report
Review/Refine Remedial Action Objectives
Develop/Refine/Screen Alternatives; Prepare Document with Alternatives Array and ARARs
Detailed Analysis Prepare Summary of Comparative Analysis
Draft FS Report
PRP
EPA
Review/Modify/Approve
• Work Plan
• SAP
Prepare or Review/Modify/Approve Risk Assessment
Review/Modify/Approve Decision on Testing, WP, SAP and Report
Review/Modify/Approve RI Report
Review/Modify/Approve FS Report
DRAFT FS AVAILABLE FOR PUBLIC COMMENT
Oversee Field Work: QA Lab Work; Review Site Characterization Summary
Review/Modify/Approve (Approval Optional)
Review/Modify/Approve (Approval Optional)
Review, Meet, Give Direction

EPA's Superfund Public Health Evaluation Manual, Superfund Exposure Assessment Manual, and Superfund Environmental Evaluation Manual, and access to the Integrated Risk Information System (IRIS) and the Public Health Risk Evaluation Data Base.

The Region will have exercised discretion, when negotiating the administrative order, in deciding whether the Agency should conduct the baseline risk assessment, whether to allow the PRPs to perform this task, or whether the Agency should perform some tasks (e.g., exposure scenarios/assumptions).

If the PRP conducts the assessments, the PRP must have a competent subcontractor. The RPM is responsible for tracking and evaluating the different components of the PRPs' baseline risk assessment. To do this effectively, the RPM should assure he/she has specialized support. If PRPs are developing exposure assumptions, they may find it helpful to work closely with the RPM. The RPM's oversight activities should include meetings and a critical evaluation of the PRPs' progress reports and any required interim deliverables. When exercising oversight authority, RPMs should attempt to resolve any disputes and to resolve any delays as they arise. RPMs should not wait until the end of the assessment process to address these issues.

RPMs should require the PRPs to submit interim deliverables. By reviewing these deliverables, RPMs can ensure that the framework of the risk assessment process does not deviate from Agency policy. These interim deliverables include:

- A list of hazardous substances present at the site, proposed indicator chemicals and their corresponding concentrations. Submittal of this list ensures that the PRPs are properly assessing the risk based upon the most problematic chemicals at the site, taking into account quantity and concentration as compared to levels that present a risk, and critical exposure pathways.

- Exposure scenarios that include a description of the PRPs' assumptions and use of validated sampling data, including:

    - Exposure points, medium routes, and numbers of exposed people, based on reasonable worst case assumptions

    - Fate and transport models and the data that will be used with the models.

- Toxicological or epidemiological studies that supplement EPA's toxicity values.

- Risk characterization.

In addition to the human health risk assessment, PRPs conduct an environmental evaluation and prepare a report. The environmental evaluation addresses any critical habitats affected by site contamination and any endangered species affected by the contamination.

Depending upon the circumstances at a particular site, the RPM may choose to expand or reduce the list of interim deliverables.

Following completion of the required tasks, including the environmental evaluation, the PRPs submit the draft RI report and baseline risk assessment report (if EPA has authorized PRP conduct of the baseline risk assessment). The environmental evaluation report may be included in the baseline risk assessment report or as a separate document.

D. Treatability Investigations

Treatability studies are designed to provide information that EPA uses in the detailed analysis of alternatives. The decision of whether to conduct these activities is based upon whether a treatment alternative is properly considered for the site, the nature and size of the site, the contaminants and media they are in, the potential for migration and possible site risks, available information in technical literature, and the uncertainties associated with selecting an appropriate site remedy. It is imperative that these activities should be initiated early since they may take over six months to complete (i.e., biotreatability tests). The final decision on the type (bench or pilot) and extent of treatability testing depends on uncertainties of treatment and the amount of work that should be deferred to the remedial design (RD) process.

In addition to the progress meetings and reports, the required deliverables for treatability investigations may include:

- Identification of candidate technologies
- Literature survey and determination of whether testing is necessary
- Treatability testing work plan, or revisions to the original work plan
- Treatability study SAP, or revisions to the original SAP
- Treatability study health and safety plan, or revisions to the original
- A treatability study evaluation report summarizing the results, evaluating the test, and describing the following:
    - Remedial technology
    - Test objectives
    - Experimental procedures
    - Treatability conditions to be tested
    - Analytical methods
    - Data management and analysis
    - Health and safety

Residual waste management

Following the completion of treatability testing, data should be analyzed and interpreted in a technical report to EPA. Depending on the sequence of activities, this report may be a part of the RI/FS report or a separate deliverable. The report should evaluate the technology's effectiveness, implementability, and actual results as compared to the predicted results. The report should also evaluate full-scale application of the technology, including a sensitivity analysis identifying the key parameters affecting full-scale operation.

E. Development and Screening of Alternatives

During the process of developing alternatives, RPMs should ensure that the PRPs undertake the following activities:

- Develop more specific remedial action objectives acceptable to EPA. This is very important as it sets the goals of the FS.
- Develop a range of general response actions.
- Identify areas or volumes of the media to be treated, contained and/or subjected to institutional controls.
- Identify, screen, and document technologies.
- Assemble alternatives.
- Screen the remedial action alternatives on the basis of effectiveness, implementability, and cost.
- Prepare an alternatives array document.

The information developed during these two activities is used in assembling remedial technologies into alternatives for either the site as a whole or for a specific operable unit.

At some sites, a number of potential remedial options may be developed early in the RI/FS process. In such cases, the RPM should screen alternatives to narrow the list of options that will be evaluated in detail. The screening process is necessary for two reasons. First, it streamlines the feasibility study process. Second, it ensures that the most promising alternatives are being considered by EPA.

RPMs should either closely scrutinize the PRPs' conduct of the screening process or do this themselves. The alternatives development screening document, including the alternatives array, must be scrutinized. At this stage, ARARs should be given specific attention. RPMs should be wary of PRP proposals that are not effective--that treat too little or do not treat to appropriate levels. RPMs must assure that Regional management will have a number of distinct options and alternatives from which to select an appropriate site remedy.

The information available at the time of screening should be used to identify and distinguish any differences among the various alternatives. If screening takes place, the technical memorandum should present the alternatives in such a manner that the RPM can evaluate each alternative with respect to its effectiveness, implementability, and cost and document the rationale for screening out any alternatives. RPMs should retain only the alternatives that are judged as the best or the most promising while retaining a range of alternatives broad enough to satisfy requirements of CERCLA and the NCP. These alternatives should be subjected to further consideration and analysis. Alternatives that are screened out will not receive further consideration unless additional information indicates that further evaluation is warranted.

In the event that there are only a limited number of viable alternatives for a particular site, the RPM should either minimize or eliminate the alternative screening process.

F. Detailed Analysis of Alternatives

Nine evaluation criteria have been developed to address statutory requirements, as well as the technical and policy considerations that have proven to be important for selecting from among the remedial alternatives. These evaluation criteria serve as the basis for conducting the detailed analyses during the FS and for subsequently selecting an appropriate site remedy. The criteria are:

- Overall protection of human health and the environment
- Compliance with ARARs
- Long-term effectiveness and permanence
- Short-term effectiveness
- Reduction of toxicity, mobility, or volume
- Implementability
- Cost
- State acceptance
- Community acceptance.

The detailed analysis process should include an evaluation of each alternative against the nine criteria. However, the middle five criteria (long-term effectiveness and permanence; short-term effectiveness; reduction of toxicity, mobility and volume; implementability; and cost) will generally require more effort and discussion because the key trade-offs or concerns among alternatives will most frequently relate to one or more of these five.

The overall protectiveness and compliance with ARARs criteria (unless an ARAR waiver has been obtained) will generally serve as threshold determinations in that they must be met. Community and State acceptance typically may not be evaluated until comments on the RI/FS report and the proposed plan have been received. The evaluation criteria are discussed in more detail in Chapter VII, Selection of Remedy.

The PRPs will submit a technical memorandum summarizing the results of the comparative analysis. In addition, the PRPs must submit a draft FS report to the RPM for review and approval. This report, as adopted or modified by EPA, provides a basis for remedy selection. It documents the development and analysis of remedial alternatives. Once EPA's comments have been incorporated to the RPM's satisfaction, the final FS report may be bound with the final RI report.

Following the PRP's completion of the RI/FS report and the RPM's confirmation that there is sufficient information to support the selection of a preferred alternative, EPA begins the process of remedy selection which is discussed in Chapter VII, Selection of Remedy.

III. PLANNING AND REPORTING REQUIREMENTS

A. SCAP/ SPMS

The RPM must periodically update information about the RI/FS process for the SCAP. For example, activities such as RI/FS starts, field work starts, and draft RI/FS completions must be entered into the CERCLIS database. The RPM must work closely with the Regional Information Management Coordinator (IMC) to ensure that the information provided is adequate for determining site funding needs.

Exhibit VI-4 presents the SCAP/SPMS targets for RI/FS.

B. Site Information Form (SIF)

RPMs are responsible for completing an accurate CERCLIS site information form (SIF) for RI/FS activity. Exhibit VI-5 provides an example of a completed SIF. RPMs should complete the SIF using the example outline of fields and the possible values:

A. Operable Unit (01)
B. Event (CO = RI/FS)
C. Lead (RP = Responsible Party)
D. Plan start/completion dates (FYQ)
E. Actual start/completion dates (MM/DD/YY; start date - date order signed, complete date - date ROD signed)
F. SPMS Target (P = Primary, A = Alternate)
G. Subevent Type (CF = Distribute RI/FS to Public)
H. Subevent Plan start/completion dates (FYQ)
I. Subevent Actual start/completion dates (MM/DD/YY)
J. Takeover Flag (see below)
K. First start/complete (A = First and only, B = First of two or more, C = Subsequent but not last of two or more, D = Final of two or more)
L. Event Start NPL Status (Y/N)
M. Financial Requirements:

    1. Financial Type (P = Planned Obligation)
    2. Budget Source (E = Enforcements for Oversight)
    3. Financial Amount (amount required for oversight)
    4. Plan/Actual Date
    5. Financial Vehicle (TES)
    6. Fund Priority Status (APR = Approved, ALT = Alternate)

An RI/FS start involves the development of plans for sampling, operations, quality assurance, health and safety, and community relations.

An RI/FS completion is defined as the signature of the ROD. A ROD is the document prepared after completion of the public comment period on the RI/FS which identifies the Agency's selected remedy for a site.

The takeover flag is an indicator which identifies events which have had a change in lead. The valid codes are: T = Takeover, TT = Takeover of a takeover, or CO# = An

Exhibit VI-4

SCPA/SPMS Targets for RI/FS

Targets

ACTIVITIES	SPMS TARGET	SCAP TARGET	QUARTERLY TARGET	ANNUAL TARGET
Remedial Investigation/Feasibility Study Start				
First RI/FS Starts		X	X	X
Subsequent RI/FS Starts		X	X	X
RI/FS To Public		X	X	X
RI/FS Completions (ROD) (S/C-3)	X *		X	X
First RI/FS Completions (ROD)		X	X	X
Subsequent RI/FS Completion (ROD)		X	X	X
Final RI/FS Completion (ROD)		X	X	X

- The SPMS target combines first, subsequent and final as a single target.

Example VI-5

Sample SIF for RI/FS Activity

EVENT/SUBEVENT/FINANCIAL
INFORMATION (EVT/SVT/FIN)
07/10/89

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS SITE INFORMATION FORM (SIF)

ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
*EPA ID NO: XX2999999999 FMS SITE SPILL ID: AS

S/I RPM-OSC NAME/PHONE: ____________/(___)___-____
EVENT REGIONAL CONTACT NAME/PHONE: ____________/(___)___-____
OTHER REG CONTACT NAME/PHONE: ____________/(___)___-____

			<------------START		------------>	<----------- COMPLETE		--------> SPMS	
*OP UNIT *EVENT SUBEVENT TYPE	*OP UNIT NAME *EVENT NAME *SUBEVENT NAME	LEAD	PLAN (MM/DD/YY)	*PLAN (FY/Q)	*ACTUAL (MM/DD/YY)	PLAN (MM/DD/YY)	*PLAN (FY/Q)	*ACTUAL (MM/DD/YY)	TARGET	SCAP NOTE
Ⓐ 01	________									
Ⓑ CO	RI/FS	Ⓒ RP	_/_/_	Ⓓ 88/1	Ⓔ 11/6/87	_/_/_	Ⓓ 89/2	Ⓔ _/_/_	Ⓕ P	________
Ⓖ CF	Distribute RI/FS to Public	_	_/_/_	Ⓗ _/_	Ⓘ _/_/_	_/_/_	Ⓗ 89/1	Ⓘ 10/23/88	-	________

Ⓙ *TAKEOVER FLAG: __ Ⓚ *FIRST START: A Ⓚ *FIRST COMPLETE: A

*EVENT QUALIFIER: _ Ⓛ *EVENT NPL INDICATOR: Y APPROVAL AUTHORITY: _

*RCRA OFF-SITE ID: ________, ________, ________, ________, ________, ________

COOPERATIVE AGREEMENT NUMBER: ________ COOPERATIVE AGREE. AMEND NO.: __, __, __, __, __ STATE %: __

---------------------------- CERCLIS FINANCIAL DATA ----------------------------

Ⓜ *FIN SEQ NO	*FMS ELG	*FIN TYPE	BDGT SRCE	*ACN	*DCN	*FIN AMT.	*PLAN FY/Q	*FIN DATE	*FIN VEHICLE	*CONTRACTOR	*FUND PRTY STAT	*FIN NOTE	WA NO	AMND NO
__	_	① P	② E	____	____	③ 25,000	④ 89/2	____	⑤ TES#	________	⑥ APK	________	____	_
__	_	_	_	____	____	____	____	____	____	________	__	________	____	_
__	_	_	_	____	____	____	____	____	____	________	__	________	____	_
__	_	_	_	____	____	____	____	____	____	________	__	________	____	_

---------------------------- SUMMARY FMS FINANCIAL DATA ----------------------------

FIN BDGT SRCE	ACN	DCN	NET COMMIT AMOUNT	ORIG COMMIT DATE	FMS OPEN COMMIT	NET OBLIG AMOUNT	ORIG OBLIG DATE	NET OUTLAY AMOUNT	LAST OUTLAY DATE	FIN VEH	CONTRACTOR NAME/ OBLIGATING DOC NO
-	________	____		_/_/_			_/_/_		_/_/_	____	________

*CORE DATA ELEMENT OR CODE ANY QUESTIONS? CALL CSC CERCLIS STAFF ACTION: ______(CSC ONLY) event code (C2111) followed by a sequence number to indicate which event was taken over that created the new event record.

C. Budget

Funding for oversight of PRP-conducted RI/FSs is obtained from OSWER's enforcement budget. The standard RI/FS oversight budget is $20,000 per quarter. The average PRP-lead RI/FS implementation requires ten to twelve fiscal year quarters. When planning the budget, the RPM should ensure that no remedial funding is used for PRP oversight.

By using the enforcement budget, it may be possible for the RPM to buy in to remedial contract services such as ARCS. Before attempting to buy in to these services, RPMs should check with their IMC and Section Chief.

IV. POTENTIAL PROBLEMS/RESOLUTIONS

During the course of a PRP-conducted RI/FS, the PRP may encounter problems, or the RPM may identify unsatisfactory or deficient PRP performance. This section discusses some possible solutions to the problems commonly encountered by RPMs overseeing PRP-conducted RI/FSs.

A. *Dispute Resolution*

When disputes arise between the RPM and the PRPs' project manager, the RPM should attempt to informally resolve the matter. If informal efforts fail, the RPM should implement formal dispute resolution mechanisms after consultation with the site attorney.

The AO usually will set forth the formal dispute resolution procedures. This process is generally initiated by a written notice of disapproval by an appropriate manager within the Agency. Generally, the PRP must reach a negotiated agreement within 14 days of receiving the notice. For cases in which the negotiations fail, EPA will prepare a written record of the negotiation's outcome. Often the order is structured to require the PRP to appeal or do the work. This decision can be appealed to the Division Director, who is the final arbitrator of the dispute. If the PRP fails to comply with the decision, the Agency may take the following action:

- Seek stipulated and statutory penalties
- Take over the RI/FS
- Take other action (e.g., file suit)

The RPM should work closely with Regional management and ORC to coordinate dispute resolution efforts.

B. *Corrective Measures*

If oversight investigations discover that the PRP, or its contractor, is performing field and laboratory activities in a manner inconsistent with the Work Plan or SAP, the RPM may need to implement corrective measures. For the most part, informal dispute resolution procedures should be sufficient to remedy the problem. The RPM can initiate this process by first talking with the PRP's designated technical coordinator. If this approach does not correct the problem, the RPM should then use the more formal approach of issuing a notice of deficiency.

To issue a notice of deficiency, RPMs should:

- Notify the PRPs in writing
- Describe the nature of the deficiency
- Request that the PRP undertake appropriate corrective action within a specific period

Failure to respond to the deficiency notice could lead to penalties or EPA takeover.

V. REFERENCES

Regulation OSHA Regulations, 29 C.F.R. § 1910.130 (45654 Fed. Reg., Dec. 19, 1986).

Guidance OWSER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (October 1988).

OSWER Directive 9835.3-01A, "Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies" (October 1988).

OSWER Directive 9833.3A, "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989).

OSWER Directive 9285.4-00, "Guidance for Conducting ATSDR Health Assessment Activities with the Superfund Remedial Process" (April 1987).

OSWER Directive 9283.1-2 "Draft Guidance on Remedial Actions for Contaminated Ground Water at Superfund Sites."

OSWER Directive 9835.3,"Guidance on Oversight of Potentially Responsible Party Remedial Investigations and Feasibility Studies" (To be issued).

OSWER Directive 9335.0-7B, "Data Quality Objectives for Remedial Response Activities" (March 1987).

OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 1988).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan, Record of Decision, Explanation of Significant Differences and the ROD Amendment" (July 1989).

OSWER Directive 9335.0-14, "A Compendium of Superfund Field Operation Methods" (September 1987).

OSWER Directive 9835.8 , "RI/FS Model Statement of Work" (June 2, 1989).

OWPE, "Draft TES User Guide" (June 1987).

USEPA, "The User's Guide to the Contract Laboratory Program" (August 1982).

USEPA, "Selected Technical Guidance for Superfund Projects" (December 1988). This pamphlet is reproduced on the following pages.

Manuals OSWER Directive 9284-1, Superfund Public Health Evaluation Manual (October 1986).

OSWER Directive 9285.7-01, Interim Final Risk Assessment Guidance for Superfund - Environmental Evaluation Manual, (March 1989).

OSWER Directive 9285.5-1, Superfund Exposure Assessment Manual (September 1987).

OSWER Directive 9234.1-01 and -02, CERCLA Compliance with Other Laws Manual (August 1988).

OSWER Directive 9230.0-3B, Community Relations in Superfund: A Handbook (June 1988).

US EPA, NEIC Policies and Procedures Manual (revised November 1984).

Training OERR conducts periodic training on the RI/FS process.

Contacts OWPE, CERCLA Enforcement Division, Compliance Branch, Enforcement Section, at FTS 382-5617.

OWPE, CERCLA Enforcement Division, Guidance and Oversight Branch, and FTS 475-6770.

OERR, Hazardous Site Control Division, at FTS 382-4632.

VI. ACTIVITIES CHECKLIST

This section discusses the RPM's management functions in overseeing all RI/FS activities. This checklist is not intended to present an exhaustive set of procedures. RPMs should exercise their professional discretion when deciding what procedures are appropriate for a particular site.

Preparation and Management

1)______ If not previously done, identify the preliminary scope of RI/FS activity for the site. Establish site-specific objectives. Develop a general management strategy for site activity.

    a)______ Assure appropriate ESD and management review of scoping.

2)______ Organize regional team and specialists as needed (e.g., hydrogeologist, human risk specialist, ecological risk specialist, and remedial engineer).

3)______ Procure the services of qualified oversight assistant(s).

4)______ Coordinate interagency and intergovernmental responsibilities, including those of the State, ATSDR, and natural resource trustees.

5)______ Assure budgetary support in SCAP.

6)______ Assess the PRPs' ability to conduct the RI/FS (financial, technical managerial).

Community Relations Plan

7)______ Develop a community relations plan and define the PRPs' participation (if any).

Project Planning

8)______ Assure that PRPs have collected and considered available data.

9)______ Conduct an initiation meeting and site visit with the PRPs.

10)______ Prior to the PRP's development of a work plan, sampling and analysis plan, and site health and safety plan, meet with PRPs, and, as appropriate, ESD and oversight assistant, to assure that:

    a)______ PRPs understand objectives of SARA and, for the site, preliminary remedial action objectives and alternatives b)______ PRPs understand need for treatability studies

c)______ PRPs understand the RI/FS guidance, risk assessment guidances and other guidances

d)______ PRPs understand what to include in the plans

e)______ PRPs understand roles and responsibilities.

11)______ Review the work plan, with in-house (e.g. ESD and WMD specialists) and contractor support.

a)______ Background information

b)______ Objectives, preliminary conceptual model

c)______ Management plan, including general strategy, activity schedules, advance notice to EPA of field activities, reporting and meeting schedules (including data reporting), deliverables schedules, equipment and personnel, data management

d)______ Site characterization

- Field support; preparation
- Physical characteristics (e.g. geology; hydrology); sources of contamination; nature and extent of contamination; information to be gathered; methods of gathering information; extent of field investigation and how it is determined (include off-site for hydrology, extent of contamination, etc.); sufficiency for multiple purposes (e.g. extent, fate and transport, risk, treatability, delineation of remedial alternative; methods of data analysis; information produced and format)
- Assure adequate off-site work (e.g. for hydrological setting, pathways)
- Supplemental field work
- Site characterization report requirements, data presentation

e)______ Risk assessment

- Federal and State ARARs (approach, primarily to contaminant specific and location specific)
- Human health

- **Approach to contaminant identification; exposure assessment, use of SEAM, use of current and maximum reasonable use scenario assuming growth; exposure points with pathways, media, exposure route, persons exposed and amount exposed to, fate and transport models; use of IRIS and other data on toxicity; risk characterization; deliverables in final report**

- Environmental evaluation
- Plan, implementation, deliverables, report
- Review/approval

f)______ RI report

- Content, form, review, response to EPA's comments, approval

g)______ Treatability studies

- Schedule early start
- Candidate technologies, approach to determining need for testing?
- Work plan contents
- Implementation
- Evaluation report

h)______ Development and Screening of Alternatives

- Development review/approval of remedial action objectives; contaminant specific ARARs
- Approach to developing and refining alternatives
- Approach to screening
- Methodology for developing and incorporating action specific ARARs
- Deliverables, including alternatives array document
- Review/approval

i)______ Detailed analysis

- Nine Criteria and comparative analysis
- Report on comparative analysis and presentation
- Response to EPA's comments

j)______ FS Report

- Content, Form, review, response to EPA's comments

12)_____ Review the sampling and analysis plan

a)_____ FSP

- Site background (including an evaluation of existing data)
- Sampling objectives
- Data quality objectives
- Sample media
- Sampling locations and rationale
- Sampling frequency and rationale
- Number of samples and justification
- Number of field blanks, trip blanks, and duplicates
- Sampling equipment
- Sampling procedures and rationale
- Sampling handling (including chain-of-custody procedures)
- Field analytical procedures
- Decontamination procedures
- Sample designation
- Laboratory analytical procedures, equipment, and detection limits
- Systematic requirements to fully delineate each source and the nature and extent of contamination to DQO levels.

b)_____ QAPP

DQOs for measurements - Assure that soils, ground water measured to levels consistent with risk range in proposed NCP

- Sampling procedures
- Sample custody procedures
- Calibration procedures and frequency
- Analytical procedures
- Data reduction, validation, and reporting procedures
- Internal quality control checks and frequency
- Performance and systems audits and frequency
- Preventative maintenance procedures and schedules
- Data assessment procedures

- Corrective action procedures
- Quality assurance reporting procedures.

13)______ Receive the health and safety plan.

14)______ Draft comments; changes to PRP's plans.

15)______ Coordinate with State, trustees as necessary.

16)______ Management review of project plans.

17)_____ Approve/modify plans.

18)_____ Refine oversight plan.

- Address what is to be done, when, by whom
- Assure oversight persons are informed of their duties and of schedules
- Budget resources
- Assure other communications: e.g., State, ATSDR, trustee
- Anticipate common problems.

19)_____ Open Administrative Record at Region and near site; add approved plans.

20)_____ Community relations activities upon approval of plans.

Oversee RI Field Work and Data Analyses

21)______ Meeting of EPA team members, specialists, QA/QC person and oversight assistant to review work, schedules, roles and responsibilities.

22)______ Meet with PRPs' contractor to assure that they understand work plan; requirements for notice to EPA; field methodology; QA/QC at site and in lab (methods, detection limit, etc.)

23)______ Review PRP's field support preparation and resources.

24)______ Develop field check lists.

25)______ Site characterization, source definition, description of nature and extent of contamination

On an ongoing basis

a)______ Assure compliance with work plan and sampling and analysis plan.

b)______ Oversee schedule, assure advance notice by PRP of field work, schedule site inspections, have oversight assistant review data as developed by PRP for sufficiency, QA/QC trends.

c)______ Assure adequate locations, types, depths, numbers, etc. of samples.

d)______ For ongoing fieldwork, check quality of methods, sampling, testing; assure sample splits, spikes, blanks, etc. QA/QC of loss/analyses - assure use of proper protocols; lab audit, compare splits etc.

- Geology, physiography
- Ground water monitoring well construction/installation
- Ground water elevations and pump tests in various strata
- Soil sampling (surface/at depths)
- Ground water sampling
- Surface water sampling
- Sediment sampling

e)______ Well, other receptor surveys.

f)______ Review field books, activity logs etc.

g)______ Review progress reports.

h)______ Review data management.

i)______ Hold progress status meetings.

j)______ Assess whether the data incrementally collected are sufficient for all purposes (site characterization, source definition, nature and extent of contamination, fate and transport, treatability, remedial alternatives (e.g. bedrock groundwater remediation).

k)______ Based on available data, direct collection of additional data (e.g. source contamination to background, extent of plume to background).

26)______ Assure appropriate data provided to ATSDR, State, Trustees.

27)______ Review and comment on site characterization summary. Assure proper and accurate data presentation.

28)______ Update Administrative Record.

29)______ Assure adequate oversight activity documentation (cost documentation).

30)______ Identify interim actions as necessary.

Perform or Oversee Risk Assessment

31)______ Secure qualified contractor.

32)______ Identify any highly controversial substances that warrant HQ assistance.

33)______ Identify Federal and State Contaminant Specific ARAR.

34)______ If PRP will perform the risk assessment, meet to assure that PRP understands the requirements.

35)______ Human health risk assessment/endangerment assessment.

    a)______ Review contaminant identification/indicator chemicals memorandum.

    b)______ Review exposure assessment (exposure scenarios, exposure assumptions, population at risk, fate and transport model etc.).

    c)______ Review toxicity assessment (sources; application).

    d)______ Review human health risk characterization.

36)______ Environmental Evaluation

    a)______ Review environmental evaluation plan; discuss with trustees

    b)______ Review environmental evaluation report, discuss with trustees

37)______ Obtain/review ATSDR health assessment; State views.

38)______ Assure appropriate EPA management review.

39)______ Comment on/finalize risk assessment.

a)______ Gather additional data as needed.

Remedial Investigation Report

40)______ Copy to State, trustees, ATSDR as appropriate.

41)______ Develop preliminary comments.

42)______ Assure appropriate EPA managerial review.

43)______ Final comments.

44)______ Review and modify/approve interim RI report (possible additional work may be identified in FS).

45)______ Update Administrative Record.

46)______ Fact sheets, public meetings as necessary.

Treatability Testing

47)______ Identify the need for treatability testing. If testing is done:

- a)______ Obtain specialized support as necessary.
- b)______ Discuss requirements with PRPs.
- c)______ Review/modify/approve proposal on need for literature search vs. testing.
- d)______ Review PRPs' work plan/SAP.
- e)______ Review PRPs' report.
- f)______ Require, if necessary, additional testing.

Development and Screening of Alternatives

48)______ Meet with PRPs to discuss remedial action objectives; alternative development and screening; detailed analysis; SARA - compliant remedies.

49)______ Review, modify, and possibly approve remedial action objectives submitted by PRPs.

50)______ Review work/report by PRPs, identifying potential technologies for areas of media, evaluation of process types.

51)______ Review range of alternatives developed by PRPs; focus on effective remedies, preference for treatment.

52)______ Advise State of alternatives.

53)______ Review the document submitted by PRPs on alternatives passing the screen, including alternatives array summary with associated ARARs and description of underlying work.

54)______ Confer with State.

55)______ Submit comments, assuring appropriate alternatives passed the screen and proper identification of ARARs, particularly action-specific ARARs. If PRPs continue to lean improperly toward no-action, non-effective low-cost remedies, schedule a meeting. Consider enforcement and EPA takeover.

56)______ Finalize approved identification of acceptable group of remedies that should be considered in the detailed analysis

57)______ Assure updated Administrative Record.

Detailed Analysis

58)______ Review the comparative analysis document prepared by PRPs (unless EPA reserved this).

59)______ Assure that, to the extent possible, State, trustees views are known.

60)______ Meet with PRPs.

61)______ Provide comments, direction to PRPs for FS.

62)______ Assure updated Administrative Record.

Feasibility Study

63)______ Circulate PRP draft FS to State, trustees, intra-EPA groups.

64)______ Develop preliminary comments.

65)______ Assure internal EPA and management review; also discuss proposed plan.

66)______ Finalize comments.

67)______ Assure development of an FS that supports proposed plan.

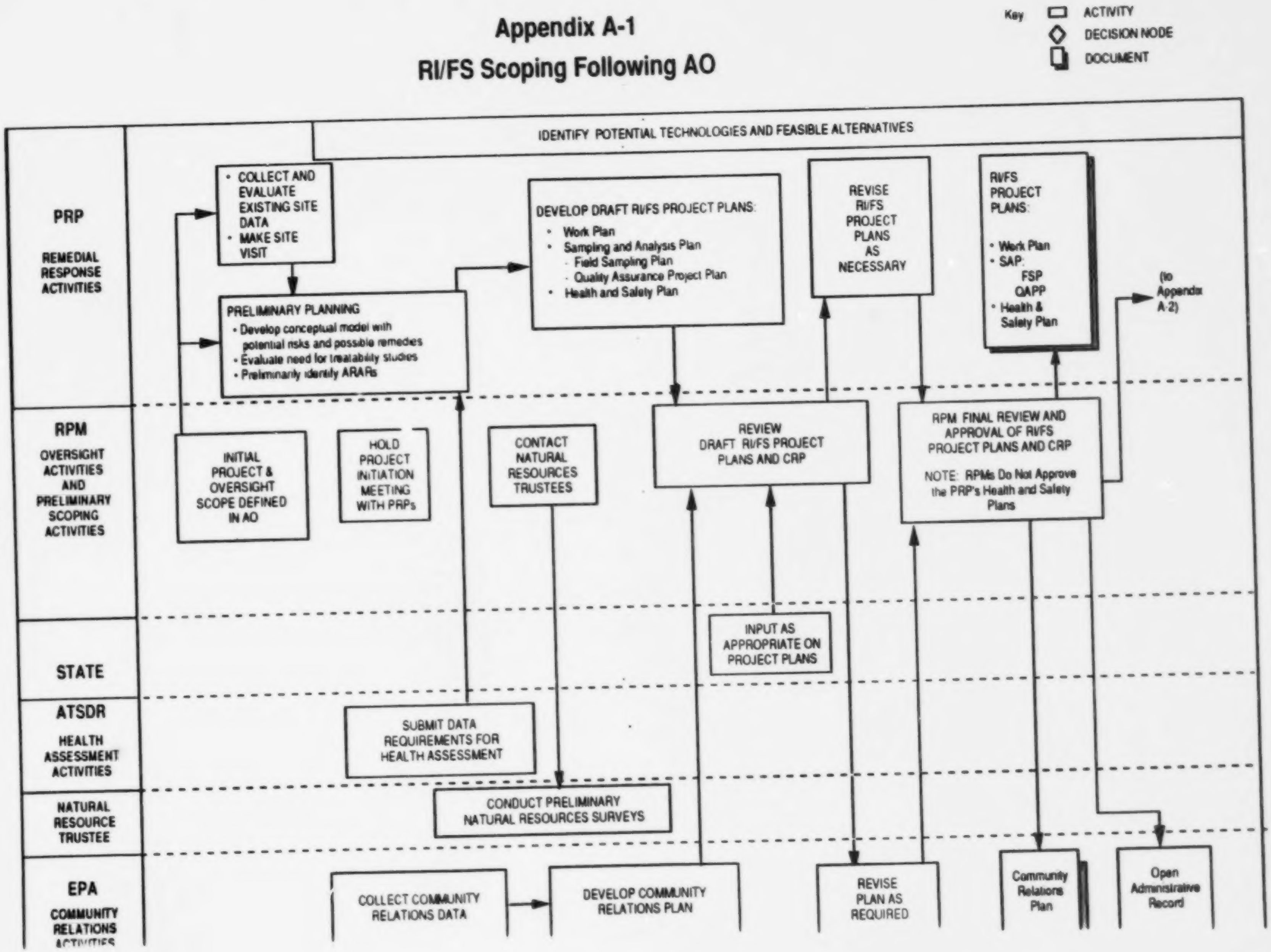
68)______ Update Administrative Record.

69)______ Oversight/response cost billing.

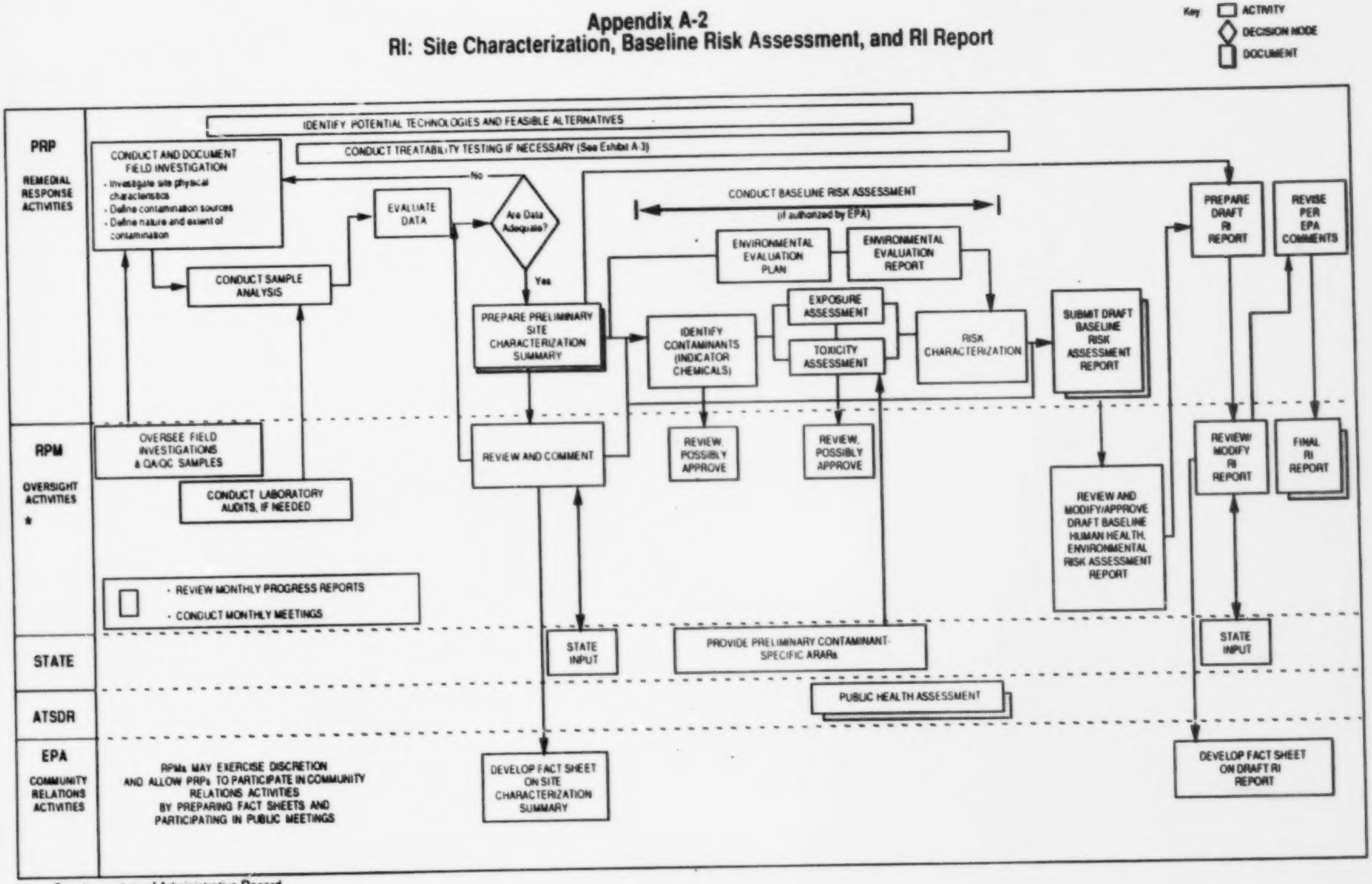
70)______ Preparation for RD/RA negotiations.

Appendix

Appendix A-1
RI/FS Scoping Following AO


Key
ACTIVITY
DECISION NODE
DOCUMENT
PRP
REMEDIAL RESPONSE ACTIVITIES
RPM
OVERSIGHT ACTIVITIES AND PRELIMINARY SCOPING ACTIVITIES
STATE
ATSDR
HEALTH ASSESSMENT ACTIVITIES
NATURAL RESOURCE TRUSTEE
EPA
COMMUNITY RELATIONS ACTIVITIES
IDENTIFY POTENTIAL TECHNOLOGIES AND FEASIBLE ALTERNATIVES
• COLLECT AND EVALUATE EXISTING SITE DATA
• MAKE SITE VISIT
PRELIMINARY PLANNING
• Develop conceptual model with potential risks and possible remedies
• Evaluate need for treatability studies
• Preliminarily identify ARARs
DEVELOP DRAFT RI/FS PROJECT PLANS:
• Work Plan
• Sampling and Analysis Plan
- Field Sampling Plan
- Quality Assurance Project Plan
• Health and Safety Plan
REVISE RI/FS PROJECT PLANS AS NECESSARY
RI/FS PROJECT PLANS:
• Work Plan
• SAP:
FSP
QAPP
• Health & Safety Plan
(to Appendix A-2)
INITIAL PROJECT & OVERSIGHT SCOPE DEFINED IN AO
HOLD PROJECT INITIATION MEETING WITH PRPs
CONTACT NATURAL RESOURCES TRUSTEES
REVIEW DRAFT RI/FS PROJECT PLANS AND CRP
RPM FINAL REVIEW AND APPROVAL OF RI/FS PROJECT PLANS AND CRP
NOTE: RPMs Do Not Approve the PRP's Health and Safety Plans
INPUT AS APPROPRIATE ON PROJECT PLANS
SUBMIT DATA REQUIREMENTS FOR HEALTH ASSESSMENT
CONDUCT PRELIMINARY NATURAL RESOURCES SURVEYS
COLLECT COMMUNITY RELATIONS DATA
DEVELOP COMMUNITY RELATIONS PLAN
REVISE PLAN AS REQUIRED
Community Relations Plan
Open Administrative Record

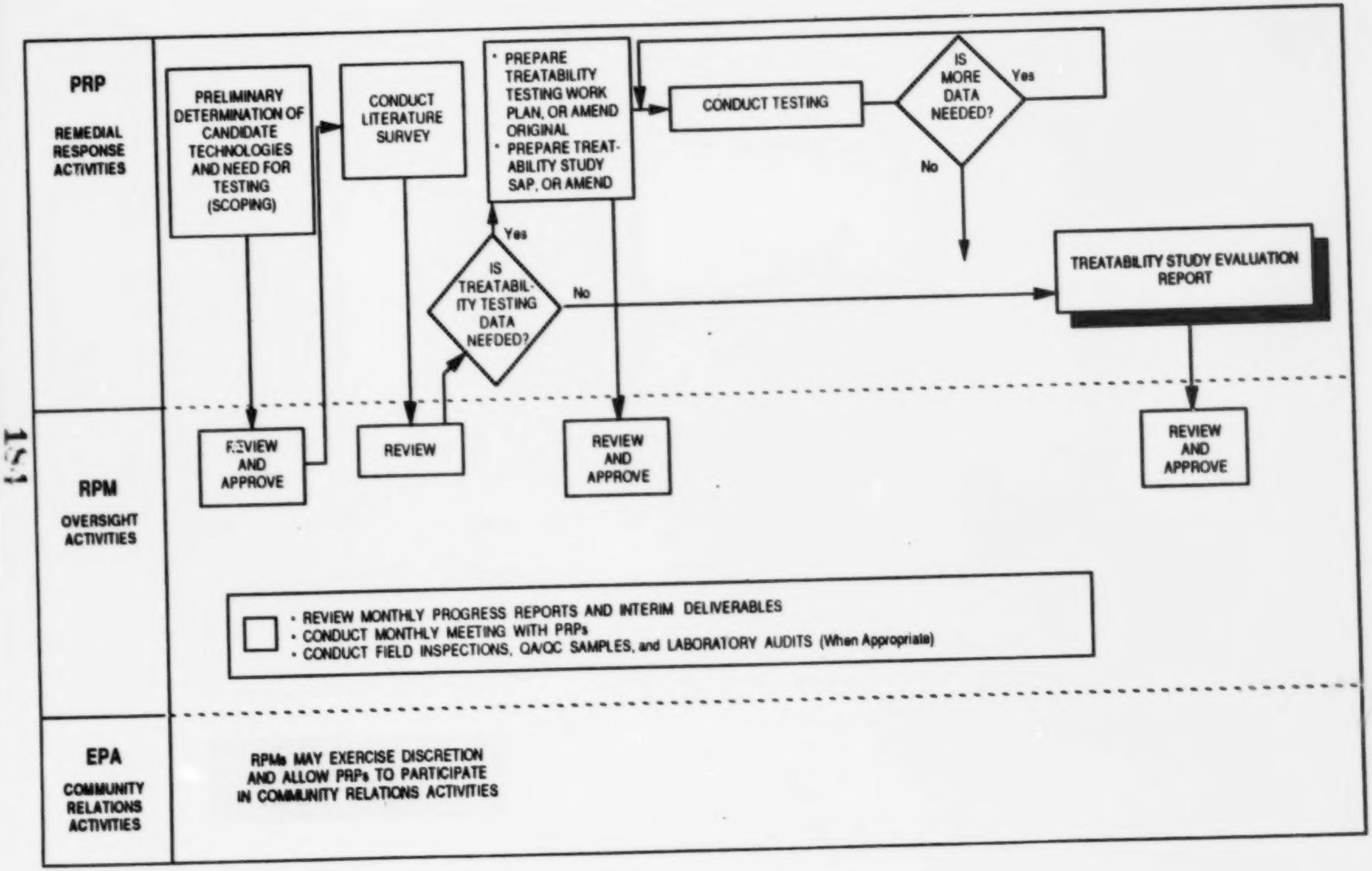
Appendix A-2
RI: Site Characterization, Baseline Risk Assessment, and RI Report


Key
ACTIVITY
DECISION NODE
DOCUMENT
PRP
REMEDIAL RESPONSE ACTIVITIES
RPM
OVERSIGHT ACTIVITIES *
STATE
ATSDR
EPA
COMMUNITY RELATIONS ACTIVITIES
IDENTIFY POTENTIAL TECHNOLOGIES AND FEASIBLE ALTERNATIVES
CONDUCT TREATABILITY TESTING IF NECESSARY (See Exhibit A-3)
CONDUCT AND DOCUMENT FIELD INVESTIGATION
- Investigate site physical characteristics
- Define contamination sources
- Define nature and extent of contamination
No
CONDUCT SAMPLE ANALYSIS
EVALUATE DATA
Are Data Adequate?
Yes
PREPARE PRELIMINARY SITE CHARACTERIZATION SUMMARY
CONDUCT BASELINE RISK ASSESSMENT
(if authorized by EPA)
ENVIRONMENTAL EVALUATION PLAN
ENVIRONMENTAL EVALUATION REPORT
IDENTIFY CONTAMINANTS (INDICATOR CHEMICALS)
EXPOSURE ASSESSMENT
TOXICITY ASSESSMENT
RISK CHARACTERIZATION
SUBMIT DRAFT BASELINE RISK ASSESSMENT REPORT
PREPARE DRAFT RI REPORT
REVISE PER EPA COMMENTS
OVERSEE FIELD INVESTIGATIONS & QA/QC SAMPLES
CONDUCT LABORATORY AUDITS, IF NEEDED
REVIEW AND COMMENT
REVIEW, POSSIBLY APPROVE
REVIEW, POSSIBLY APPROVE
REVIEW AND MODIFY/APPROVE DRAFT BASELINE HUMAN HEALTH, ENVIRONMENTAL RISK ASSESSMENT REPORT
REVIEW/ MODIFY RI REPORT
FINAL RI REPORT
- REVIEW MONTHLY PROGRESS REPORTS
- CONDUCT MONTHLY MEETINGS
STATE INPUT
PROVIDE PRELIMINARY CONTAMINANT-SPECIFIC ARARs
STATE INPUT
PUBLIC HEALTH ASSESSMENT
RPMs MAY EXERCISE DISCRETION AND ALLOW PRPs TO PARTICIPATE IN COMMUNITY RELATIONS ACTIVITIES BY PREPARING FACT SHEETS AND PARTICIPATING IN PUBLIC MEETINGS
DEVELOP FACT SHEET ON SITE CHARACTERIZATION SUMMARY
DEVELOP FACT SHEET ON DRAFT RI REPORT

* Ongoing update of Administrative Record

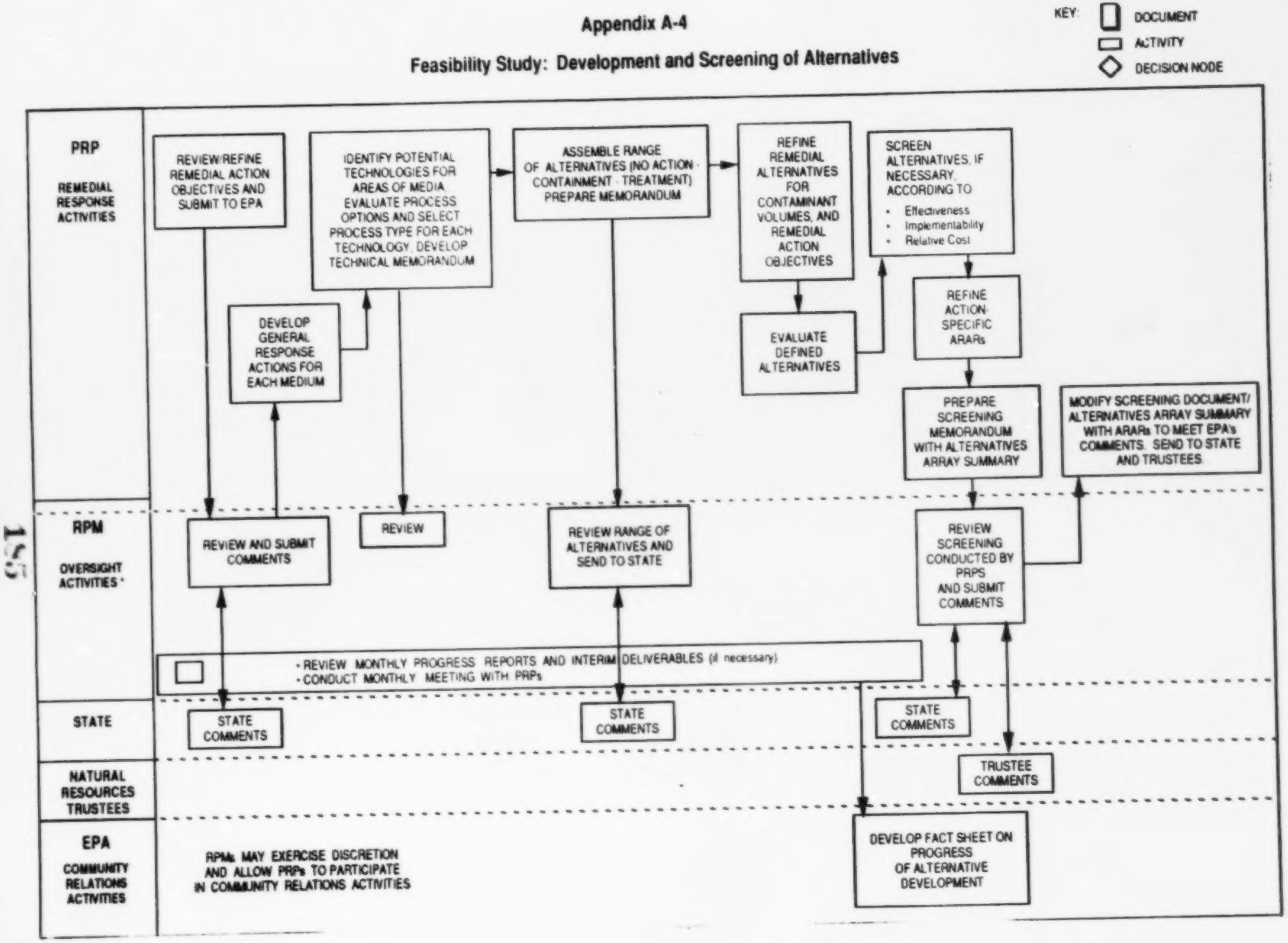
Appendix A-3

Treatability Investigations


Key:
ACTIVITY
DECISION NODE
DOCUMENT
PRP
REMEDIAL RESPONSE ACTIVITIES
RPM
OVERSIGHT ACTIVITIES
EPA
COMMUNITY RELATIONS ACTIVITIES
PRELIMINARY DETERMINATION OF CANDIDATE TECHNOLOGIES AND NEED FOR TESTING (SCOPING)
REVIEW AND APPROVE
CONDUCT LITERATURE SURVEY
REVIEW
IS TREATABILITY TESTING DATA NEEDED?
Yes
No
• PREPARE TREATABILITY TESTING WORK PLAN, OR AMEND ORIGINAL
• PREPARE TREATABILITY STUDY SAP, OR AMEND
REVIEW AND APPROVE
CONDUCT TESTING
IS MORE DATA NEEDED?
Yes
No
TREATABILITY STUDY EVALUATION REPORT
REVIEW AND APPROVE
• REVIEW MONTHLY PROGRESS REPORTS AND INTERIM DELIVERABLES
• CONDUCT MONTHLY MEETING WITH PRPs
• CONDUCT FIELD INSPECTIONS, QA/QC SAMPLES, and LABORATORY AUDITS (When Appropriate)
RPMs MAY EXERCISE DISCRETION AND ALLOW PRPs TO PARTICIPATE IN COMMUNITY RELATIONS ACTIVITIES

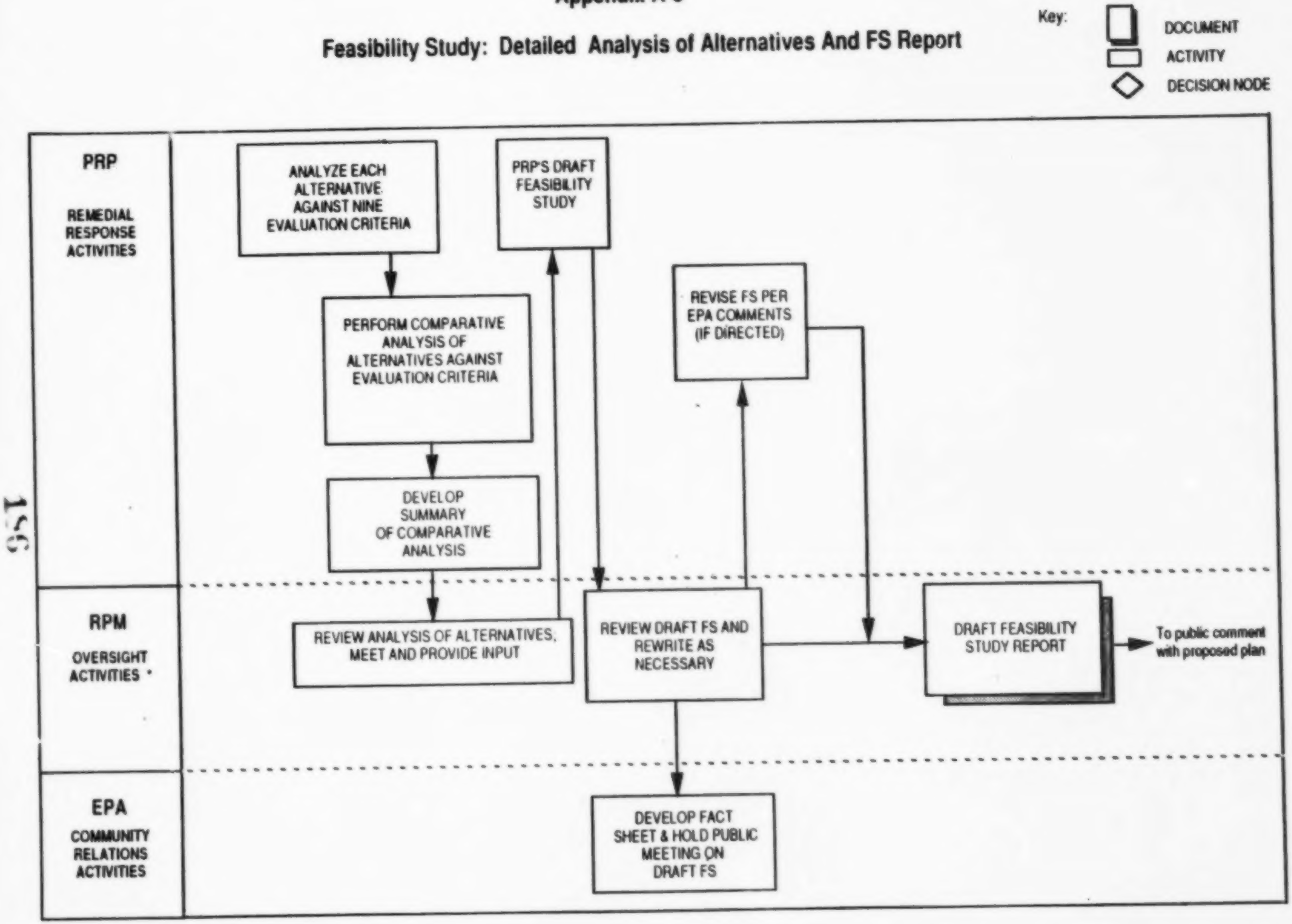
Appendix A-4

Feasibility Study: Development and Screening of Alternatives


KEY:
DOCUMENT
ACTIVITY
DECISION NODE
PRP
REMEDIAL RESPONSE ACTIVITIES
RPM
OVERSIGHT ACTIVITIES *
STATE
NATURAL RESOURCES TRUSTEES
EPA
COMMUNITY RELATIONS ACTIVITIES
REVIEW/REFINE REMEDIAL ACTION OBJECTIVES AND SUBMIT TO EPA
DEVELOP GENERAL RESPONSE ACTIONS FOR EACH MEDIUM
IDENTIFY POTENTIAL TECHNOLOGIES FOR AREAS OF MEDIA. EVALUATE PROCESS OPTIONS AND SELECT PROCESS TYPE FOR EACH TECHNOLOGY. DEVELOP TECHNICAL MEMORANDUM
ASSEMBLE RANGE OF ALTERNATIVES (NO ACTION - CONTAINMENT - TREATMENT) PREPARE MEMORANDUM
REFINE REMEDIAL ALTERNATIVES FOR CONTAMINANT VOLUMES, AND REMEDIAL ACTION OBJECTIVES
EVALUATE DEFINED ALTERNATIVES
SCREEN ALTERNATIVES, IF NECESSARY, ACCORDING TO
• Effectiveness
• Implementability
• Relative Cost
REFINE ACTION-SPECIFIC ARARs
PREPARE SCREENING MEMORANDUM WITH ALTERNATIVES ARRAY SUMMARY
MODIFY SCREENING DOCUMENT/ ALTERNATIVES ARRAY SUMMARY WITH ARARs TO MEET EPA's COMMENTS. SEND TO STATE AND TRUSTEES
REVIEW AND SUBMIT COMMENTS
REVIEW
REVIEW RANGE OF ALTERNATIVES AND SEND TO STATE
REVIEW SCREENING CONDUCTED BY PRPS AND SUBMIT COMMENTS
• REVIEW MONTHLY PROGRESS REPORTS AND INTERIM DELIVERABLES (if necessary)
• CONDUCT MONTHLY MEETING WITH PRPs
STATE COMMENTS
STATE COMMENTS
STATE COMMENTS
TRUSTEE COMMENTS
RPMs MAY EXERCISE DISCRETION AND ALLOW PRPs TO PARTICIPATE IN COMMUNITY RELATIONS ACTIVITIES
DEVELOP FACT SHEET ON PROGRESS OF ALTERNATIVE DEVELOPMENT

Appendix A-5

Feasibility Study: Detailed Analysis of Alternatives And FS Report


Key:
DOCUMENT
ACTIVITY
DECISION NODE
PRP
REMEDIAL RESPONSE ACTIVITIES
RPM
OVERSIGHT ACTIVITIES *
EPA
COMMUNITY RELATIONS ACTIVITIES
ANALYZE EACH ALTERNATIVE AGAINST NINE EVALUATION CRITERIA
PERFORM COMPARATIVE ANALYSIS OF ALTERNATIVES AGAINST EVALUATION CRITERIA
DEVELOP SUMMARY OF COMPARATIVE ANALYSIS
REVIEW ANALYSIS OF ALTERNATIVES; MEET AND PROVIDE INPUT
PRP'S DRAFT FEASIBILITY STUDY
REVIEW DRAFT FS AND REWRITE AS NECESSARY
REVISE FS PER EPA COMMENTS (IF DIRECTED)
DEVELOP FACT SHEET & HOLD PUBLIC MEETING ON DRAFT FS
DRAFT FEASIBILITY STUDY REPORT
To public comment with proposed plan

* [illegible]

SELECTION OF REMEDY

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
  Overview 1
  Statutory Authority 1
  Responsibilities 2
  Evaluation Criteria for Comparing Alternatives 2
    Threshold Criteria 2
    Primary Balancing Criteria 3
    Modifying Criteria 4
  ROD Delegation and Briefings 5

II. PROCEDURES AND INTERACTIONS 6

A. Review of RI/FS 6
B. Preparation of Proposed Plan 6
  Format of Proposed Plan 6
  Contents of Proposed Plan 6
C. State/Federal and Public Input on Preferred Alternative 8
D. Finalization of Proposed Plan 8
E. Public Input on Remedial Alternatives 8
    Public Notice 8
    Public Meeting 9
    Public Comment Period 9
  Administrative Record 9
  PRP Participation 9
F. Special Notice To PRPs 10
  Required Notifications 10
G. Final Selection of Preferred Alternative 10
H. Prepare Draft ROD 10
  Components of Record of Decision 11
    Declaration 11
    Decision Summary 11
    Responsiveness Summary 12
  Changes from the Proposed Plan to the ROD 12
    Unanticipated Changes 12
I. State/Federal Consultation on Selected Remedy 13
  Concurrence 13
J. Briefing and Signature 13
K. Notice 14
L. Post-ROD Changes 14

III. PLANNING AND REPORTING REQUIREMENTS 15

A. Reporting Requirements 15
  Submission of Documents 15

Information Databases 15
Implications of Submissions 15
SCAP/SPMS 15
B. Planning Requirements 16
Contractor Participation 16

IV. POTENTIAL PROBLEMS/RESOLUTIONS 17

A. Inconsistent PRP Alternative 17
B. Extensive Public Comment 17
C. Disputes Over ROD 17

V. REFERENCES 18

Policy 18
Guidance 18
Manuals 18
Guides 19
Training 19
Contacts 19

VI. ACTIVITY CHECKLIST 20

APPENDIX A

APPENDIX B

SELECTION OF REMEDY

I. DESCRIPTION OF ACTIVITY

Introduction

This chapter provides a general discourse on the process used by Federal agencies to select a final remedial action from among the options that undergo detailed analysis in the RI/FS. See Exhibit VII-1 for a graphic representation of the elements that comprise the remedy selection process. In addition, guides to developing proposed plans, developing Superfund Records of Decisions and Superfund Land Disposal Restrictions, as well as the index of the Compendium of CERCLA Response Selection Guidance Documents, are included in the appendix to this chapter for easy reference. For more detailed information on the remedy selection process, consult the National Oil and Hazardous Substance Pollution Contingency Plan (NCP), "Interim Final Guidance on Preparing Superfund Decision Documents" and other documents referenced at the end of chapter.

Overview

The Agency has established the remedy selection process to fulfill the mandates of section 121 of CERCLA. Substantively, the remedy selection process involves the following: 1) an objective assessment of alternative approaches for remediating problems at sites with respect to nine evaluation criteria that encompass statutory requirements, and 2) a risk management decision as to which option provides the most appropriate solution for a site or site problem. Procedurally, the selection of a CERCLA remedial action from among alternatives is a two-step process. First, the lead agency, in conjunction with the support agency, reviews the analysis in the RI/FS and Administrative Record to identify a preferred alternative that is presented to the public in a proposed plan along with the supporting information and analysis, for review and comment. Second, the lead agency reviews the public comments, consults with the support agency in order to evaluate whether the preferred alternative is still the most appropriate remedial action for the site or site problem, and makes a decision. EPA is the ultimate decisionmaker in selecting a remedy under CERCLA.

Statutory Authority

Section 121 of CERCLA requires that the chosen remedy meet certain standards. The lead agency must select a remedy that:

- Is protective of human health and the environment
- Attains legally Applicable or Relevant and Appropriate Requirements (ARARs), or provides grounds for invoking a waiver of ARARs
- Is cost-effective
- Utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable
- Addresses the preference for remedies that employ treatment that permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances, pollutants, and contaminants as a principal element.

Section 121 of CERCLA requires that Superfund remedies be consistent with the requirements of the National Contingency Plan (NCP). The proposed NCP specifies the nine evaluation criteria used to compare remedial alternatives.[1]

CERCLA also establishes procedures for the remedy selection process. The remedy selection process must include the opportunity for substantial and meaningful involvement of State officials. The Agency must comply with public participation requirements by allowing the public to comment and submit information on the remedy for inclusion in the Administrative Record (see sections 113(k), 117, and 121(f) of CERCLA). The Agency must document its decision in an Administrative Record, and make the record accessible to the public. EPA must notify PRPs, State personnel, and natural resource trustees about negotiations for implementation of the remedy.

Responsibilities

Federal and State agencies conduct remedy selection activities as a cooperative effort. Section 121(a) of CERCLA states that the President (EPA) shall select appropriate remedial actions. EPA and the State agencies decide on a case-by-case basis which agency will become the lead agency. In some States, an agreement between the agencies, such as a Superfund Memorandum of Agreement (SMOA) or Cooperative Agreement (CA), embodies this decision. (For more information on the EPA/State partnership, see Chapter XIV, State Enforcement). In addition to designating itself or another agency as the lead agency for a site, EPA generally delegates lead responsibilities from Headquarters to the Regions. Regardless of whether the State is designated the lead agency, EPA is always responsible for deciding the remedy and signing the ROD.

In general, the remedy selection process is the sole responsibility of the agencies involved. However, contractors and potentially responsible parties may participate in particular aspects of the process.

Evaluation Criteria for Comparing Alternatives

EPA has structured a risk management decision-making process designed to satisfy the numerous requirements of CERCLA. This process involves the assessment of alternative hazardous waste management approaches and a comparison of these approaches using nine evaluation criteria. A remedy is selected by balancing the trade-offs between alternatives to identify the most appropriate protective solution which meets (or waives) ARARs for a given site. The nine evaluation criteria are used to develop the RI/FS detailed analysis, on which the remedy decision is based. The criteria include:

Threshold Criteria. The two threshold criteria which must be satisfied in order for an alternative to be eligible for selection are:

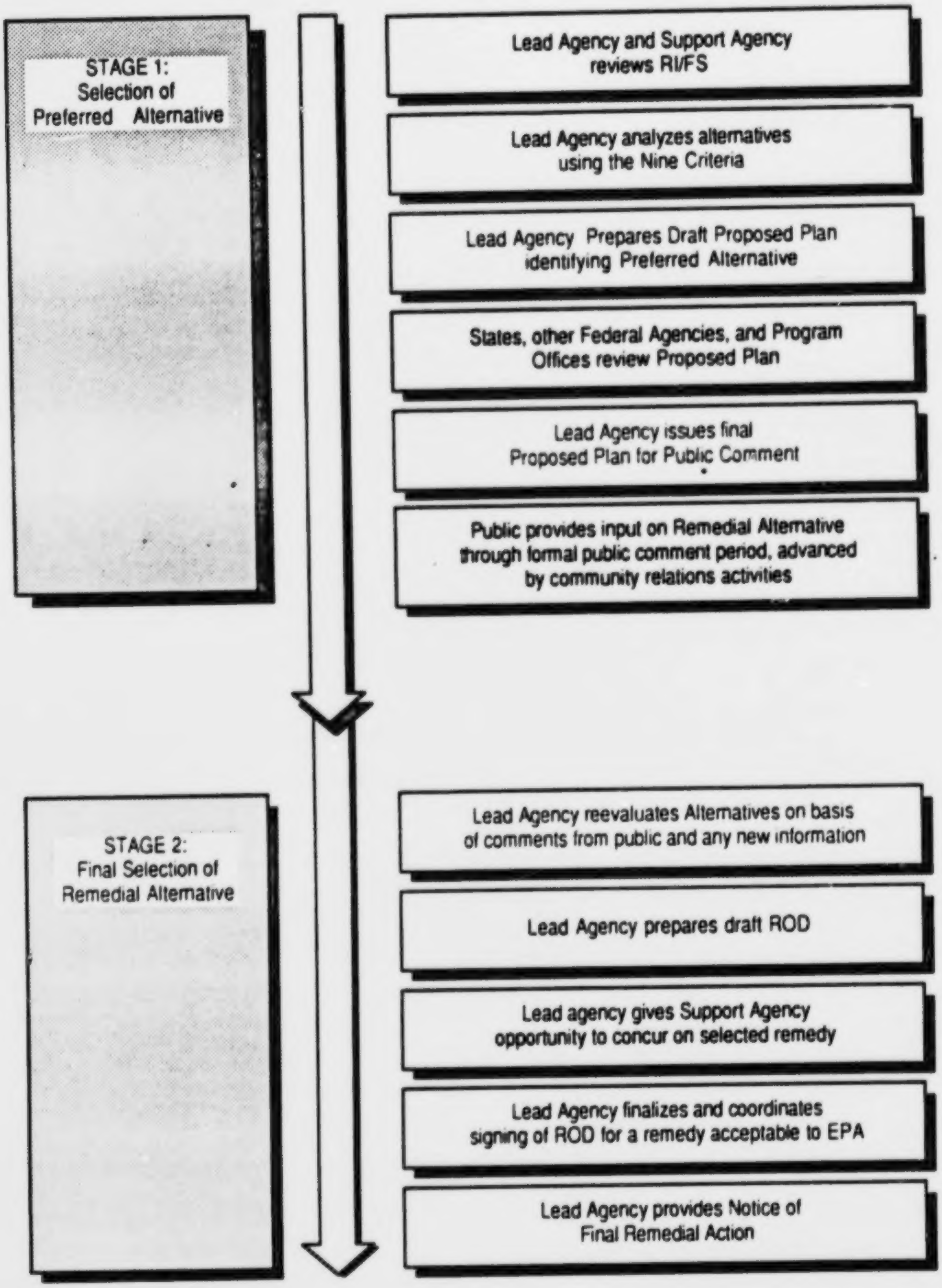
- *Overall protection of human health and the environment.* Protectiveness is the primary requirement that CERCLA remedial actions must meet. A remedy is

---

[1] The 1985 NCP is effective until amended, except as modified by SARA. The proposed revisions, 40 CFR Part 300 (December 1988) are not yet effective. However, they may serve as guidance where SARA required changes to the program.

Exhibit VII-1

Selection of Remedy
Overview of Decision-Making Process


STAGE 1: Selection of Preferred Alternative
Lead Agency and Support Agency reviews RI/FS
Lead Agency analyzes alternatives using the Nine Criteria
Lead Agency Prepares Draft Proposed Plan identifying Preferred Alternative
States, other Federal Agencies, and Program Offices review Proposed Plan
Lead Agency issues final Proposed Plan for Public Comment
Public provides input on Remedial Alternative through formal public comment period, advanced by community relations activities
STAGE 2: Final Selection of Remedial Alternative
Lead Agency reevaluates Alternatives on basis of comments from public and any new information
Lead Agency prepares draft ROD
Lead agency gives Support Agency opportunity to concur on selected remedy
Lead Agency finalizes and coordinates signing of ROD for a remedy acceptable to EPA
Lead Agency provides Notice of Final Remedial Action

protective if it adequately eliminates, reduces, or controls all current and potential risks posed through each pathway by the site. A site where, after the remedy is implemented, hazardous substances remain without engineering or institutional controls must allow for unrestricted use and unlimited exposure for human and environmental receptors. For those sites where hazardous substances remain such that unrestricted use and unlimited exposure is not allowable, engineering controls, institutional controls, or some combination of the two must be implemented to control exposure and thereby ensure reliable protection over time. In addition, implementation of a remedy cannot result in unacceptable short-term risks to, or cross-media impacts on, human health and the environment.

- *Compliance with Applicable or Relevant and Appropriate Requirements (ARARs).* Compliance with ARARs is one of the statutory requirements for remedy selection. Alternatives are developed and refined throughout the CERCLA process to ensure either that they will meet all of their respective ARARs or that there is good rationale for waiving an ARAR. During the detailed analysis, information on Federal and State action-specific ARARs will be assembled along with previously identified chemical-specific and location specific ARARs. Alternatives will be refined to ensure compliance with these requirements, or to begin to identify waivers that might be invoked.

Primary Balancing Criteria. The five primary balancing criteria used to weigh major trade-offs among the different hazardous waste management strategies are:

- *Long-term effectiveness and permanence.* This criterion reflects CERCLA's emphasis on implementing remedies that will ensure protection of human health and the environment into the future as well as in the near term. In evaluating alternatives for the degree of long-term effectiveness and permanence they afford, the analysis should focus on the residual risks that will remain at the site after the completion of the remedial action. This analysis should include consideration of the following: the degree of threat posed by the hazardous substances remaining at the site; the adequacy of any controls (e.g. engineering and institutional controls) used to manage the hazardous substances remaining at the site; the reliability of those controls; and the potential impacts on human health and the environment, should the remedy fail based on assumptions included in the reasonable maximum exposure scenario. This evaluation criterion incorporates the statutory requirements to take into account the following: The uncertainties associated with land disposal; the goals, objectives, and requirements of RCRA; the persistence, toxicity, mobility, and propensity to bioaccumulate of the hazardous substances and their constituents; the long-term potential for adverse health effects from human exposure; the potential for future remedial action costs if the remedy were to fail; and the threats to the environment associated with redisposal or containment of the hazardous substances.

- *Reduction of toxicity, mobility or volume.* This criterion addresses the statutory preference for remedies that employ treatment as a principal element by ensuring that the relative performance of the different treatment alternatives in reducing toxicity, mobility, or volume will be assessed. Specifically, the analysis should examine the magnitude, significance, and irreversibility of reductions.

- *Short-term effectiveness.* This criterion includes the short-term impacts of the alternatives (i.e., impacts during implementation) on the neighboring community, the workers, or the surrounding environment, including the potential threats to human health and the environment associated with excavation, treatment, and transportation of hazardous substances. The potential cross-media impacts of the remedy and the time to achieve protection of human health and the environment also should be analyzed.

- *Implementability.* Implementability considerations include the technical and administrative feasibility of the alternatives, and the availability of the goods and services (e.g. treatment, storage, or disposal capacity) on which the viability of the alternative depends. Implementability considerations often affect the timing of various remedial alternatives (e.g., limitations on the season in which the remedy can be implemented, the number and the complexity of materials-handling steps that must be followed, the need to obtain permits for off-site activities, and the need to secure technical services such as well drilling and excavation).

- *Cost.* Cost encompasses all construction and operation and maintenance costs incurred over the life of the project. Net present value of these costs are considered. EPA believes that the discount rate is an aspect of developing a realistic accounting of the future costs of remedial alternatives and an accurate comparison of the total costs, and the cost-effectiveness, of treatment and non-treatment remedies.

Modifying Criteria. The two modifying criteria are taken into account after the above criteria have been evaluated and generally are focused on after public comment is received. They are:

- *State acceptance.* This criterion, which is an ongoing concern throughout the remedial process, reflects the statutory requirement to provide for substantial and meaningful State involvement. To avoid problems at the time of the proposed plan or ROD, it is preferable to communicate with the State throughout the RI/FS. State comments may be addressed during the development of the FS, as appropriate, although formal State comments usually will not be received until after the State has reviewed the draft RI/FS and the draft proposed plan prior to the public comment period. The proposed plan that is issued for public comment along with the RI/FS report should indicate whether or not the State has commented on or concurred with EPA's preferred alternative or that State comments have not been received. The ROD should specifically address State concurrence or nonconcurrence with the response action that is selected, particularly noting State views on compliance or noncompliance with State ARARs.

- *Community acceptance.* This criterion refers to the community's comments, where community is broadly defined to include all interested parties, on the remedial alternatives under consideration. These comments are taken into account throughout the RI/FS process through the communications that occur as the Community Relations Plan is implemented. Again, EPA can only preliminarily assess community acceptance during the development of the FS, since formal public comment will not be received until after the public comment period for the proposed plan and the RI/FS is held. The detailed analysis, however, may summarize preliminary comments on components of the alternatives received up to that point.

Reference

Proposed NCP pages 51428-52429 (December 21, 1988).

ROD Delegation and Briefings

The authority to sign the Record of Decision usually is delegated from EPA Headquarters to the Regions following a Regional request for delegation in the applicable forum. Consultation with Headquarters continues to be required in certain circumstances. The lead agency will conduct a pre-ROD briefing for Headquarters staff if the site involves nationally significant or precedent-setting issues. Consultation with Headquarters is also currently required for any site where the proposed remedy exceeds $30 million or requires a Fund-balancing waiver. Additionally, a pre-ROD briefing for Headquarters must be performed for all RODs which require Headquarters concurrence.

II. PROCEDURES AND INTERACTIONS

This section discusses the steps in the decision-making process required to fulfill the mandates of sections 113, 117, and 121 of CERCLA.

A. *Review of RI/FS*

The RI/FS provides the decision-maker with an assessment of the extent and nature of the contamination at the site, an assessment of current and potential risk posed by the site to human health and the environment, a description of alternatives, and comparison of alternatives based on the nine criteria. In addition, the RI/FS identifies the performance levels each alternative is expected to attain to ensure protection of human health and the environment. The lead agency must confirm that there is sufficient information to support the selection of a preferred alternative when reviewing the RI/FS data, and should require further study if the information is insufficient.

EPA's RPM should assure that proper remedial action objectives are chosen, and the proper alternatives pass the screening. Before completion of the final RI/FS report, EPA should consult with the State in examining the findings of the comparative analysis. EPA then makes a preliminary determination of the preferred alternative.

B. *Preparation of Proposed Plan*

Section 117 of CERCLA requires the lead agency to issue a proposed plan that identifies its preferred remedial alternative. The proposed plan highlights information about the site, remedial alternatives evaluated in the RI/FS report, and the preferred alternative. It also describes all opportunities for public input, and requests comments from the community on each of the remedial options.

Format of Proposed Plan

The lead agency may issue the plan in a fact sheet format. If, however, the plan presents complicated remedial options or involves a site that has sparked public controversy, the lead agency may consider issuing the plan in an expanded format. In either case, the agency should write it in a style that is informative and readily understandable by the public. It may be helpful to have the community relations coordinator review the format of the plan before it is issued.

Contents of Proposed Plan

The proposed plan should address the following topics.

- Statement of Document's Purpose
    - Describes functions of plan
    - Directs public to RI/FS
    - Solicits input on all alternatives.
- Site Description
    - Gives physical description
    - Explains site history

  - Identifies lead and support agencies.

- Role and Scope of Operable Unit or Response Action

- Summary of Site Risks

  - Identifies chemicals of concern

  - Identifies exposure scenarios

  - Summarizes current and potential site risks.

- Summary of Alternatives

  - Briefly describes alternatives evaluated in detail, including cost and implementation time.

- The Preferred Alternative and Evaluation of Alternatives

  - Identifies preferred alternative

  - Lists evaluation criteria

  - Profiles performance of preferred alternatives against evaluation criteria, highlights trade-offs with respect to other options

  - Describes ARARs waivers

  - Indicates preliminary determination of compliance with statutory requisites.

- Community Involvement

  - Identifies locations, times, and dates for comment periods, meetings, and access to Administrative Record and officials

  - States whether special notice was issued.

These topics are described in detail in OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan and Record of Decision" (July 1989).

C. *State/Federal and Public Input on Preferred Alternative*

Following is a general discussion of the process for coordinating State/Federal and public (including PRP) input on the remedial alternatives and preferred option described in the proposed plan.

When EPA selects a preferred alternative at a PRP-lead site, an opportunity for review and comment on all alternatives should be provided to States and other Federal agencies prior to the release of the proposed plan for public comment. The RPM should also seek substantial input from the State and State agencies. Early State involvement improves the Superfund program's ability to identify and meet ARARs and address State issues and facilitates concurrence on the selected remedy.

State-lead sites fall into two categories: 1) sites where EPA has provided funding and has retained the right to select the remedy, and 2) sites where EPA is not involved. Regarding the first category, in the event that the State is the lead, and EPA does not concur on the selected remedy, EPA can assume the lead for the ROD and proceed through the design stage. Such instances are not expected to occur often.

In the second category, the State should be reminded that EPA is not bound by the remedy selection unless the Regional Administrator signs the ROD or a concurrence on it. The State should send copies of the RI/FS report and draft proposed plan to appropriate program offices. If the Regional Administrator may sign the ROD, the RPM should assure consistency with CERCLA and the NCP, the sufficiency of the Administrative Record, and technical backup for the RI/FS including QA/QC and treatability testing.

D. *Finalization of Proposed Plan*

EPA reviews the State's written comments, summarizes them in the plan, and provides a response. In evaluating the State's comments, EPA should consider State cost sharing and ARARs. The response may include revision of the preferred alternative. If the site is State-lead and EPA does not agree with the State's preferred remedy, EPA must advise the State in writing that EPA is not bound by the State's decision.

E. *Public Input on Remedial Alternatives*

Once the proposed plan is finalized, the lead agency must make the plan available to the public and announce its availability. A notice must be placed in a local newspaper of general circulation. In addition, the agency should notify the public of all opportunities and resources for community input in order to prepare concerned citizens for an upcoming public comment period.

Public Notice

The agency presents information to the general public on the proposed plan and upcoming public comment period primarily by placing a public notice or advertisement in a local newspaper. In addition, EPA guidance suggests announcing the availability of the RI/FS and proposed plan by sending notices to all persons on the community relations mailing list, including PRPs. The lead agency may also wish to send out fact sheets or letters to persons on the list, or distribute copies of the proposed plan.

For detailed information, see OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan and Record of Decision," (July, 1989) and OSWER Directive 9836.2 "CERCLA Mailing Lists" (January 1989).

Public Meeting

Another source of public information is public meetings. Section 117(a)(2) of CERCLA requires that the lead agency provide an opportunity for a public meeting near the site. The meeting need not take the form of a public hearing. The agency should bear in mind that no one meeting format is appropriate for all Superfund sites. The agency is required to keep a transcript of public meetings concerning the RI/FS and proposed plan.

Public Comment Period

The lead agency solicits public opinion on a preferred alternative by holding a public comment period. During the comment period, the public, including PRPs, may submit, in the form of written statements or oral comments during a meeting, information for the lead agency to consider in selecting a remedial alternative.

For a detailed discussion of community relations requirements, consult OSWER Interim Directive 9230.0-3B, Community Relations in Superfund - A Handbook (October 1988).

Administrative Record

At various times during the RI/FS and ROD process, public notices are issued that refer interested persons to the Administrative Record file for information so that they can input into the process in an informed manner and evaluate the RI/FS report and proposed plan. The Administrative Record, when completed, includes all documents that the agency considered or relied on to select the remedial action. The record file will be located at the Regional office and at a repository at or near the site to facilitate review. Chapter XV, Records Management, contains more information on the Administrative Record. In addition, Exhibit VII-2 identifies the documents that the agencies should place in the Administrative Record file during the remedy selection process.

The lead agency compiles and maintains the Administrative Record file. Complete documentation is essential to demonstrate that the agency considered all relevant information and provided a contemporaneous explanation of its decision-making.

A detailed list of information that should be included in an Administrative Record file is contained in OSWER Directive 9833.3A, "Interim Final Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989).

PRP Participation

The Agency, and not a PRP, must compile the Administrative Record; however, in some circumstances, PRPs may assist in maintaining the Administrative Record, and in conducting community relations activities. With respect to the Administrative Record, PRPs may house the record file at or near the site. The Agency must, however, decide which documents to include in the record, which documents to transmit to the PRPs for inclusion in the record, and must maintain the record index. PRP activities with respect to community relations activities may include assisting at public meetings and providing fact sheets, subject to the lead agency's approval and oversight. The Community Relations Plan should reflect the fact that PRPs are helping to conduct public information activities.

F. ***Special Notice To PRPs***

At a Federal-lead site, EPA may negotiate with the PRPs over implementation of the RD/RA, as appropriate. At a State-lead site, EPA is not required to conduct negotiations. However, if Fund monies will be requested by the State, negotiations will precede the obligation of funds unless there is good reason for not negotiating. In accordance with CERCLA, EPA may, at its discretion, send a special notice to the PRPs. The notice letter triggers a 60-day moratorium on EPA-conducted remedial action activities. If the PRPs submit a good faith proposal for conducting the work during the 60-day time frame, the moratorium continues for another 60 days while EPA evaluates the proposal and finalizes negotiations. It is important to prepare for negotiations before the ROD is signed. See Chapter VIII, RD/RA Negotiations/ Settlement, for a detailed description of the appropriate circumstances and procedures for conducting RD/RA negotiations.

Required Notifications

In addition to notifying the PRPs that the moratorium has been invoked, the RPM must notify other parties as well. The RPM shall notify State representatives and State or Federal natural resources trustees. This notification should include a copy of the special notice letter and a list of the parties receiving it. The RPM should submit at this time the notice letter and list to the Administrative Record coordinator for inclusion in the Administrative Record.

G. ***Final Selection of Preferred Alternative***

The final selection of a remedy is reflected in the draft Record of Decision (ROD). Before signing the ROD, however, EPA re-evaluates its chosen alternative as follows.

At the end of the public comment period, EPA re-evaluates its preferred alternative on the basis of comments and new information received from the public, including PRPs, and other sources. As a result of this information, the Agency may elect to:

- Adopt the preferred remedy as originally proposed
- Modify a component of the preferred remedy, or
- Select a different remedy.

If the Agency modifies its original preferred alternative, it must examine the extent of the change. Some changes must be discussed in the ROD, and some significant changes require additional opportunity for public comment.

For more detailed information, consult OSWER Draft Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents (July 1989).

H. ***Prepare Draft ROD***

After Agency re-evaluation of the chosen alternative, the Agency prepares a draft ROD. The ROD serves as the official Agency decision document on the selection of a remedy that makes all determinations and findings required by statute and regulation.

Exhibit VII-2(1)

Contents of the Administrative Record

The record file for a response action will typically, but not in all cases, include the documents listed below. Documents that are relevant only to remedial or removal response actions are indicated in brackets.

Factual Information/Data

- Preliminary assessment report
- Site investigation report
- Approved RI/FS workplan [Remedial]
- Amendments to final RI/FS workplan [Remedial]
- Sampling and analysis plan
- Project plan or program plan (QAPP) [Remedial]
- Validated sampling and analysis data
- Chain of custody forms
- Inspection reports
- Summary of remedial action alternatives (used in conjunction with early special notice letters) [Remedial]
- Data summary sheets
- Technical studies
- Endangerment assessment/risk assessment
- RI/FS [Remedial]
- Engineering evaluation/Cost analysis (EE/CA) [Removal]
- Factual information submitted by the public (including PRPs)

Policy and Guidance

- Memoranda on policy decisions (site-specific, issue-specific)
- Guidance documents
- Technical literature

Exhibit VII-2(2)
Contents of the Administrative Record

Public Participation

- Community relations plan
- Proposed plan [Remedial]
- Public notices
- Documentation of public meetings
- Public comments
- Transcript of public meeting on RI/FS and proposed plan [Remedial]
- Responses to significant comments
- Responses to State and other Federal agency comments

Other Party Information

- Documentation of State involvement
- ATSDR health assessment
- Natural Resources Trustees finding of fact and final reports

Enforcement Documents (Only if considered or relied on in selecting the response action)

- Administrative orders
- Consent decrees
- Affidavits
- Notice letters to PRPs containing relevant factual information not included elsewhere in the record file
- Responses to notice letters
- 104(e) information requests
- Responses to 104(e) information requests

Decision Documents

- ROD, including responsiveness summary [Remedial]
- Amended ROD [Remedial]
- Explanation of Significant Differences [Remedial]
- Action Memorandum [Removal]
- Amended Action Memorandum [Removal]

Components of Record of Decision

RODs consist of three basic components.

- A Declaration, which functions as an abstract for the key information contained in the ROD and is the section of the ROD signed by the EPA Regional Administrator or Assistant Administrator

- A Decision Summary, which provides an overview of the site characteristics, the alternatives evaluated, and the analysis of each option, and explains how the selected remedy meets the statutory requirements

- A Responsiveness Summary, which provides an overview and analysis of information and comments received on the proposed plan, RI/FS report, and other information in the Administrative Record.

The following discussion presents highlights of the process for compiling a ROD and the elements of each section. For a complete discussion of RODs, consult OSWER Directive 9355.3-02 "Interim Final Guidance on Preparing Superfund Decision Documents (July 1989).

Declaration

The Declaration is the section of the ROD signed by the EPA Regional Administrator or AA, OSWER. It provides a brief description of the selected remedy and the scope and role of the response action. The Declaration should summarize information supporting the determination that the selected remedy meets all statutory requirements and preferences, or provide an explanation as to why it does not. The determination of imminent and substantial endangerment should also be included in the Declaration, unless the ROD is for a No Action decision.

Decision Summary

The Decision Summary should provide an overview of the site-specific factors and analysis conducted that led to selection of the remedy. This section should include:

- The Site Name, Location and Description

- Site History and Enforcement Activities

- Highlights of Community Participation

- Scope and Role of the Operable Unit or Response Action

- Site Characteristics

- Summary of Site Risks

- Description of Alternatives

- Summary of the Comparative Analysis of Alternatives
- The Selected Remedy
- Statutory Determinations
- Documentation of Significant Changes.

Responsiveness Summary

The final component of the ROD is the Responsiveness Summary, which serves two roles. It provides information on community acceptance of the preferred remedy, which is considered by Agency decision-makers in reaching a decision on a remedy. It also comprises a freestanding document explaining how the Agency solicited and responded to community concerns, written after the Agency has chosen a remedy. The Responsiveness Summary should be both concise and complete.

It is important that each significant comment received by EPA during the public comment period get a thorough examination and response. Agency policy discussed in response to comments must be reviewed by management before it is incorporated into a final responsiveness summary.

Changes from the Proposed Plan to the ROD

Significant changes from the preferred alternative must be documented and explained in a Significant Changes section of the Decision Summary of the ROD. Non-significant changes should be documented in the Description of Alternatives section of the ROD Decision Summary. Significant changes may relate to the scope, performance or cost of the remedy as follows:

- Scope, including changes that address a substantially greater volume of waste, a new environmental pathway or media, or that encompass a substantially greater physical area of the site.
- Performance, involving changes in treatment technologies or processes that alter the long-term effectiveness of the remedy, have different short-term effects, or provide a different level of performance.
- Cost, including changes that significantly alter the capital or operation and maintenance cost estimates for the selected remedy.

Unanticipated Changes

If a change could not reasonably have been anticipated by the public, EPA must provide additional time for public comment. A change that could not reasonably have been anticipated includes selection of a new alternative not previously analyzed.

I. *State/Federal Consultation on Selected Remedy*

Once the draft ROD is complete, the lead and support agencies will brief their own management on the ROD. The lead agency will submit the ROD to the support agency, which should be allowed at least ten working days to examine the ROD, unless the CA or SMOA specifies a different time frame. Both agencies will submit it for review to support program offices. Each agency determines its own timeframe for interagency review.

In particular, lead and support agencies should get the input of Regional and State legal counsels. An area of potential dispute with the State is what requirements are relevant and appropriate. It should be stressed to the State that relevant and appropriate determinations should make sense in light of the circumstances of the release at the site. Headquarters staff will review all RODs to be signed by the AA, OSWER. They will consult with the Region on RODs involving nationally significant or precedent-setting issues. Headquarters staff also will consult with the Region on sites where the proposed remedy exceeds $30 million or uses a Fund-balancing waiver.

Based on comments received, the lead agency may modify the selected remedy and revise the ROD.

Concurrence

The agency that takes the lead responsibility for preparing the ROD actively seeks concurrence from the support agency. State-lead remedial actions conducted under federal authority require EPA signature. State-lead remedial actions at an NPL site that are conducted under State authority and with State funding may, but need not, include an EPA concurrence. Federal-lead remedial actions at an NPL site that are conducted under EPA authority may, but need not, include a State concurrence. Concurrences become part of the ROD Declaration.

While EPA may execute a ROD with a remedy that the State will not agree to, EPA should anticipate the consequences. First, it is unlikely that a State will pay for part of the remedial action and operation and maintenance if it disagrees with the remedy. Second, State non-concurrence may adversely affect settlement negotiations and a State may oppose entry of a consent decree premised upon a remedy with which it disagrees. Third, the State may testify on behalf of the PRPs in a section 106 judicial action. Nonetheless, in some instances EPA may sign a ROD over State objections. Refer to the Potential Problems/Resolutions section of this chapter for a discussion of possible approaches to be considered if the State and Federal agencies prefer inconsistent alternatives and have difficulty reaching concurrence.

J. *Briefing and Signature*

When the State completes a ROD, preferably the State Director and the EPA Regional Administrator should sign it. Where there are disagreements and EPA provided funding for the RI/FS, EPA may assume the lead on a ROD and sign it without State agreement. No State signature is required on a Federal-lead ROD, although the State has a responsibility to provide the lead agency with a written declaration of concurrence. All RODs conducted under Federal authority will be signed by the EPA Regional Administrator or the Assistant Administrator of OSWER, as specified in the delegation report.

K. *Notice*

Pursuant to section 117 of CERCLA, the lead agency will publish notice of the final remedial action plan. The notice will be published in a major local newspaper of general circulation. CERCLA also requires that the agency make the ROD available to the public before any remedial action begins. The final version of the ROD, including the Responsiveness Summary, should be included in the Administrative Record.

L. *Post-ROD Changes*

As a result of enforcement agreements or other developments during RD/RA, EPA may receive new information that leads it to alter the remedy specified in the ROD. When this occurs, EPA must evaluate the contemplated change to determine the procedures it must follow. Three categories of post-ROD changes exist:

- Non-significant differences: minor changes that do not significantly affect the overall scope, performance, or cost of the alternative, such as minor technical or engineering changes.
- Significant differences to a component of the remedy: changes that do significantly affect the overall scope, performance, or cost of the alternative, but do not alter the overall waste management approach, such as changes to ARARs, timing, cost, or implementability.
- Fundamental changes to the overall remedy: changes that alter the overall waste management approach, such as substitution of a containment remedy for a treatment remedy.

Each category of change requires documentation or an opportunity for public comment. For further information on post-ROD changes, consult OSWER Draft Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (July 1989).

III. PLANNING AND REPORTING REQUIREMENTS

A. *Reporting Requirements*

This section of the chapter discusses RPM planning and reporting requirements for the selection of remedy phase of the Superfund program.

Submission of Documents

In addition to referring documents to EPA program offices for review, the lead agency must submit them to Headquarters for purposes of receiving credit for their accomplishments. The lead agency must also send to Headquarters a hard copy of the ROD and a copy of the ROD text on disk in order to receive credit for an initial, subsequent, or final RI/FS completion.

Information Databases

The lead agency also has responsibility for enabling EPA to track accomplishments at the site, such as submission of the draft Feasibility Study to the public. The lead agency meets this responsibility by providing information on selection of remedy activities to EPA databases. The RPM is responsible for ensuring that accurate information on ROD start and completion dates goes into CERCLIS.

Implications of Submissions

The information supplied by the lead agency about RI/FS completion/submission of the ROD has many important implications. The program planning and budgeting processes use this information. The planning processes for RD/RA negotiations, design funding, and section 106 injunctive cases also rely on this information. The lead agency must make every effort to ensure the accuracy of the date and to achieve ROD completion by that time.

SCAP/ SPMS

The Selection of Remedy process is tracked through CERCLIS. Exhibit VII-3 summarizes SCAP/SPMS targets relevant to this process. Exhibit VII-4 indicates the appropriate format for completing a CERCLIS Site Information Form (SIF) for a ROD. The RPMs should complete the SIF using the example outline of fields and values.

A. Operable Unit (01, record operable unit number)
B. Event (RO = ROD)
C. Lead (F = EPA, Fund-financed; FE = PRP/Federal Enforcement; PS = PRP under State order with EPA oversight; SR = PRP response under State order and no EPA oversight; SN = State, no fund money)
D. Plan completion date (FYQ)
E. Actual completion date (MM/DD/YY, date signed by RA)
F. SPMS Target (All RODs have a code of P = Primary)
G. SCAP Note (Indicates what the ROD is addressing)
H. First complete (A = first and only; B = first of several; C = subsequent, but not last of several; D = last of several)
I. Financial Requirements (There are no financial requirements for a ROD)

The date the ROD is signed by the Regional Administrator or the Assistant Administrator for OSWER is the completion date.

B. Planning Requirements The case budget should include an estimate of dollars needed for implementation of a Community Relations Plan. The RPM must also work closely with the Office of Regional Counsel and DOJ to determine any budgeting needs to carry out case management strategy. This may include budgeting for a 106/107 action, or specialized RD/RA negotiation tasks. Other budgeting requirements might involve a Federal Enforcement Remedial Design or a Fund-financed RD/RA. For further case budget information, refer to Chapter XVI, Case Budget/Contracts.

Contractor Participation As provided in Chapter VI, RI/FS Implementation, EPA may reserve parts of the RI/FS for its own conduct or may perform parts when PRPs do not do so satisfactorily. Contractors may assist in these endeavors. Contractors also may assist in providing community relations activities, with the approval of the lead agency. Contractors may assist further by drafting straightforward portions of the ROD package (i.e., site history, description of contamination) and providing technical assistance in preparation of the Responsiveness Summary, although the accuracy of these documents remains the responsibility of the lead agency. Finally, contractors may assist the lead agency in providing meetings and briefings for agency management.

Exhibit VII-3

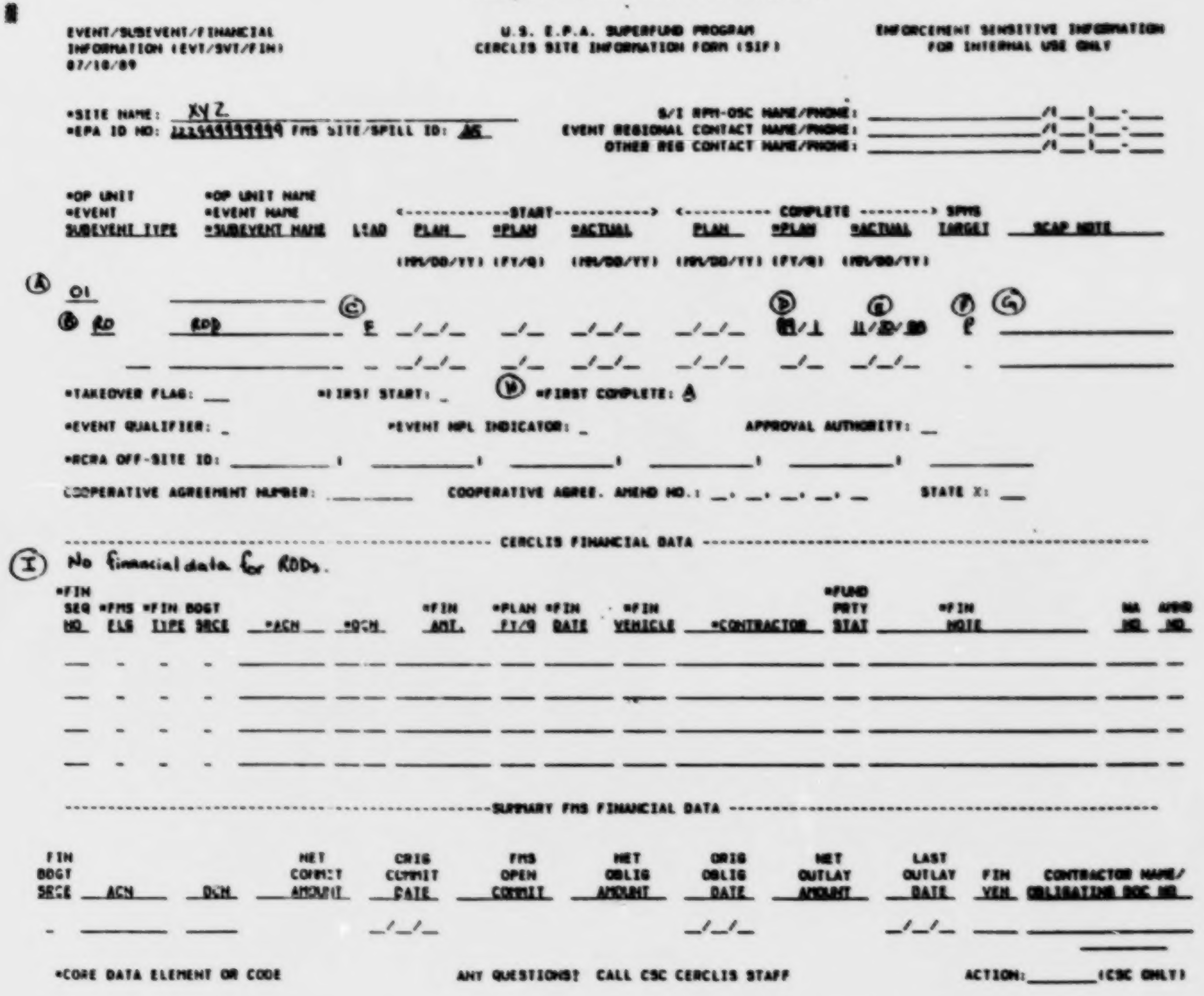
SCPA/SPMS Targets for Selection of Remedy

ACTIVITIES	SPMS TARGET	SCAP TARGET	QUARTERLY TARGET	ANNUAL TARGET
RI/FS Completions (ROD) (S/C-3)	X*			
First RI/FS Completions (ROD)		X	X	X
Subsequent RI/FS Completion (ROD)		X	X	X
Final RI/FS Completion (ROD)		X	X	X

* The SPMS target combines first, subsequent and final as a single target.

Exhibit VII-4

Sample SIF for Records of Decision



EVENT/SUBEVENT/FINANCIAL
INFORMATION (EVT/SVT/FIN)
07/10/89

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS SITE INFORMATION FORM (SIF)

ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
*EPA ID NO: 222555599999 FMS SITE/SPILL ID: A6

S/I RPM-OSC NAME/PHONE: ____/(__)__-__
EVENT REGIONAL CONTACT NAME/PHONE: ____/(__)__-__
OTHER REG CONTACT NAME/PHONE: ____/(__)__-__

	*OP UNIT *EVENT SUBEVENT TYPE	*OP UNIT NAME *EVENT NAME *SUBEVENT NAME	LEAD	START PLAN (MM/DD/YY)	START *PLAN (FY/Q)	START *ACTUAL (MM/DD/YY)	COMPLETE PLAN (MM/DD/YY)	COMPLETE *PLAN (FY/Q)	COMPLETE *ACTUAL (MM/DD/YY)	SPMS TARGET	SCAP NOTE
Ⓐ	01		Ⓒ					Ⓓ	Ⓔ	Ⓕ	Ⓖ
Ⓑ	RO	ROD	F	_/_/_	_/_	_/_/_	_/_/_	89/1	11/30/89	F	
				_/_/_	_/_	_/_/_	_/_/_	_/_	_/_/_		

*TAKEOVER FLAG: __ *FIRST START: _ Ⓗ *FIRST COMPLETE: A

*EVENT QUALIFIER: _ *EVENT NPL INDICATOR: _ APPROVAL AUTHORITY: _

*RCRA OFF-SITE ID: ____, ____, ____, ____, ____, ____

COOPERATIVE AGREEMENT NUMBER: ____ COOPERATIVE AGREE. AMEND NO.: _, _, _, _, _ STATE X: __

------------------------------------ CERCLIS FINANCIAL DATA ------------------------------------

Ⓘ No financial data for RODs.

*FIN SEQ NO.	*FMS FLG	*FIN TYPE	BDGT SRCE	*ACN	*DCN	*FIN AMT.	*PLAN FY/Q	*FIN DATE	*FIN VEHICLE	*CONTRACTOR	*FUND PRTY STAT	*FIN NOTE	NA NO.	AMND NO.

------------------------------------ SUMMARY FMS FINANCIAL DATA ------------------------------------

FIN BDGT SRCE	ACN	DCN	NET COMMIT AMOUNT	ORIG COMMIT DATE	FMS OPEN COMMIT	NET OBLIG AMOUNT	ORIG OBLIG DATE	NET OUTLAY AMOUNT	LAST OUTLAY DATE	FIN YEN	CONTRACTOR NAME/ OBLIGATING DOC NO.
				_/_/_			_/_/_		_/_/_		

*CORE DATA ELEMENT OR CODE

ANY QUESTIONS? CALL CSC CERCLIS STAFF

ACTION:____(CSC ONLY)

IV. POTENTIAL PROBLEMS/RESOLUTIONS

This section discusses problems commonly encountered by lead agencies during the selection of remedy process. It suggests methods that other agency personnel have found helpful in solving these problems.

A. *Inconsistent PRP Alternative*

When PRPs conduct the RI/FS, their FS should not recommend a remedy. The possibility exists that the FS discussions will favor a different cleanup remedy from the one the Agency feels is appropriate. For example, the PRPs may favor a less expensive option than what the Agency finds appropriate. The best means of avoiding this problem is prevention; the lead agency should provide effective oversight of the RI/FS process. See OSWER Directive 9835.1a "Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies" (October 1988). Despite these precautions, the lead agency may have to supplement the RI/FS to support its choice. The lead agency must ensure that data that supports the selected remedy exists in the Administrative Record.

B. *Extensive Public Comment*

Some preferred alternatives spark public opposition. If the lead agency proposes a preferred alternative with which the public disagrees, the public may provide a sizeable number of comments during the public comment period. Not only would this situation provoke unwanted controversy, it may also affect the timing of the selection of remedy process. The lead agency would need a substantial amount of time to respond to the comments, which might throw off its schedule for completion of the ROD. The agency should anticipate this situation and try planning community relations activities so as to receive input from many citizens at an early date, thus getting conflicts out in the open quickly and resolving issues before it will result in delay. In addition, the lead agency must allow adequate time for responding to public comments when scheduling financial commitments.

C. *Disputes Over ROD*

If the support agency does not concur on the remedy, the lead agency may choose not to proceed with the ROD. At a non-enforcement Federal-lead site, the ability to proceed with the RA is contingent upon the availability of the 10 percent (or 50 percent in the case of State-owned sites) State matching funds. The RD/RA may proceed at a PRP lead-site without State concurrence under a unilateral administrative order or consent decree. At a State-lead site, the State may proceed with a State-funded RD/RA without EPA concurrence. However, since EPA must certify that the remedial action was performed in accordance with the NCP in order to delete it from the NPL, the State is likely to have difficulty getting this certification if EPA did not concur on the ROD. Reaching consensus on the remedial action at ROD signature generally precludes these unfortunate courses of action. However, there will be isolated instances in which one of these approaches is appropriate.

V. REFERENCES

Policy National Oil and Hazardous Substance Pollution Contingency Plan, Proposed Rule (40 FR 51394) (December 21, 1988).

Guidance OSWER Directive 9335.3-01, "Guidance for Conducting Remedial Investigations and Feasibility Studies" (October 1988).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (July 1989).

OSWER Directive 9833.3A, "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989).

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).

OSWER Directive 9835.1a, "Interim Guidance on Potentially Responsible Party Participation in Remedial Investigations and Feasibility Studies" (October 1988).

OSWER Directive 9355.3-06, "RI/FS Improvements: Phase II Streamlining Recommendations" (January 1989).

OSWER Directive 9836.2, "Community Relations Mailing List" (February 6, 1989).

OSWER Directive 9347.1-02, Draft "Policy for Superfund Compliance with the RCRA Land Disposal Restrictions" (October 13, 1988).

Manuals OSWER Directive 9200.3-01B, Superfund Comprehensive Accomplishments Plan (SCAP) Manual (Annual).

OSWER Directive, 9230.0-3B, Community Relations in Superfund - A Handbook (October 1988).

OSWER Directive 9355.1-1, Superfund Federal-Lead Remedial Project Management Handbook (December 1986).

OSWER Directive 9234.1-01, CERCLA Compliance with Other Laws Manual (August 1988).

CERCLA Administrative Records: Compendium of Frequently Used Guidance Documents in Selecting Response Actions, 32 volumes (May 1989) [index is included in appendix B to this chapter].

Guides

"A Guide to Developing Superfund Proposed Plans" (July 1988).

"A Guide to Developing Superfund Records of Decision" (July 1988).

"Superfund Land Disposal Restriction Guides" (July 1989).

Training

EPA's Office of Emergency and Remedial Response periodically conducts training for Regional personnel on the RI/FS process, including selection of remedy.
For information, contact FTS 382-4632.

Contacts

Selection of Remedy
Contact Office of Emergency and Remedial Response, Hazardous Site Control Division, Site Policy & Guidance Branch, Remedial Analysis, at FTS 382-2339.

Development of ROD
Contact Office of Waste Programs Enforcement, CERCLA Enforcement Division, Compliance Branch, Enforcement Section, at FTS 382-4836.

State Concurrence
Contact Office of Waste Programs Enforcement, CERCLA Enforcement Division, Guidance and Oversight Branch, Guidance Section, at FTS 382-4826.

Land Disposal Restrictions
Contact Office of Waste Programs Enforcement, CERCLA Enforcement Division, Compliance Branch, at FTS 382-4819.

Also:
Office of Waste Programs Enforcement, CERCLA Enforcement Division, Guidance and Oversight Branch, at FTS 475-6770.

Office of Emergency and Remedial Response, Hazardous Site Control Division, Remedial Planning and Response Branch, at FTS 382-4640.

Office of Emergency and Remedial Response, Hazardous Site Control Division, Site Policy and Guidance Branch, at FTS 382-2339.

VI. ACTIVITY CHECKLIST

The following checklist is not intended to present an exhaustive set of procedures. RPMs should exercise their professional discretion when deciding what procedures are appropriate for a particular site.

Selection of Preferred Alternative

1)_____ Review RI/FS report. Confirm that there is sufficient information to support the selection of a preferred alternative. Require further study if the information is insufficient.

2)_____ Make a preliminary determination on a preferred alternative.

3)_____ Produce draft version of proposed plan that identifies preferred remedial alternative.

4)_____ Review and comment on all alternatives by States and other Federal agencies for RP-lead sites.

5)_____ Send draft RI/FS report and draft proposed plan to appropriate program offices.

6)_____ Review State comments, summarize them in proposed plan and draft Agency response.

7)_____ Finalize proposed plan by lead Agency addressing support agency and other program office comments as appropriate.

8)_____ Submit RI/FS, proposed plan, comments, and responses to Administrative Record, along with any other information used in reaching decision.

9)_____ Publish newspaper notice of availability of proposed plan and RI/FS and other opportunities and resources for community input.

10)_____ Notify persons on mailing list that proposed plan and RI/FS are complete.

11)_____ Conduct public meeting upon request.

12)_____ Conduct community relations activities.

13)_____ Conduct public comment period.

Preparation for RD/RA Negotiations (see Chapter VIII, RD/RA Negotiations/Settlement)

Final Selection of Remedial Alternative

14)_____ Re-evaluate preferred alternative on basis of comments and new information received from the public including PRPs and other sources.

15)_____ Prepare draft version of ROD Declaration and Decision Summary.

16)_____ Prepare Summary and Response to Comments for Responsiveness Summary.

17)_____ Conduct public comment period on any significant changes which were not logical outgrowths of the earlier remedial alternatives.

18)_____ Finalize ROD Decision Summary.

19)_____ Complete Responsiveness Summary.

20)_____ Brief lead agency management on ROD.

21)_____ Submit ROD to program offices and support agency, which will brief its management on the ROD.

22)_____ Receive input from Regional counsel.

23)_____ Receive concurrence from support agency on the selected remedy.

24)_____ Brief agency decision-makers and present ROD for signatures.

25)_____ Publish notice and make ROD available to public through Administrative Record.

26)_____ Provide information on ROD start and completion for entering into CERCLIS.

27)_____ Send copy of ROD to Headquarters.

Appendix A

EPA

A Guide to Developing Superfund Proposed Plans

July 1988

CERCLA section 117(a) requires preparation of Proposed Plans for site remediation that are available to the public for comment. The purp
of a Proposed Plan is to highlight key aspects of the RI/FS report, provide a brief analysis of remedial alternatives under consideration, iden
the preferred alternative, and provide members of the public with information on how they can participate in the remedy selection process.
notice and brief analysis of the Proposed Plan is published in a major local newspaper of general circulation. In addition, the Proposed P
RI/FS report, and the other contents of the administrative record typically are available at an information repository near the site.

This guide outlines the major components of the Proposed Plan and suggests effective ways in which the various sections can be presen
EPA recommends issuing Proposed Plans in a fact sheet format. For some highly complex sites or remedies, a more lengthy Plan ma
prepared separate from the RI/FS report. In all cases, Proposed Plans should be written in a style that makes the material easy for the publ
understand. The point should always be emphasized that the preferred alternative is a preliminary determination and that the Agency is ea
to receive comments on all of the alternatives.

Detailed guidance on the preparation of the Proposed Plan is available in chapters 2 and 3 of the draft revised ROD guidance docum
(OSWER Directive 9355.3 - 02).

EPA Announces Proposed Plan.

The Proposed Plan should begin with a statement of the document's purpose. This introduction should indicate that the Plan:

- Fulfills the requirements of CERCLA section 117(a);
- Describes the remedial alternatives analyzed for the site or operable unit;
- Identifies the preliminary decision on a preferred alternative and explains the rationale for the preference;
- Highlights key information in the RI/FS report and administrative record, to which the reader is referred for further details; and
- Solicits community involvement in selection of a remedy.

Site Description.

Provide a brief description of the site, including:

- The site name and location,
- The history of site activities that led to the problems,
- The site area or media to be addressed, and
- The lead and support agencies in site cleanup.

Figure 1 is an example of a site map that could be included.

Role and Scope of Operable Unit or Response Action.

Describe the scope of this action and its role within the overall site cleanup strategy.

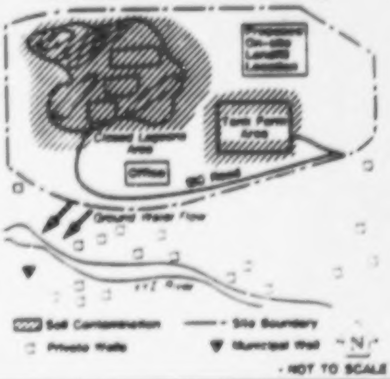
Summary of Alternatives.

Describe briefly each of the alternatives evaluated in the detailed analysis of the FS. Highlight:

- Treatment components,
- Engineering controls (noting the type of containment controls); and
- Institutional controls.

Quantities of waste and implementation requirements related to each component should be noted as well as the estimated construction and operation and maintenance costs and
estimated implementation time of each alternative. Emphas
that these are estimates. An example is presented in **Highligh**

Figure 1
EIO Industrial Site and Surroundings



Highlight 1: Summary of an Alternative

Excavation, on-site incineration of contaminated soils, and solidification and off-site disposal of residual metals and ash.

Estimated Construction Cost: $42,463,300
Estimated Annual O&M Costs: $26,200
Estimated Implementation Timeframe: 30 Months to Completion

Under this alternative, a mobile incinerator would be brought to the site, and 28,000 cubic yards of contaminated soils would be destroyed on-site. Waste gases and water from this process would be collected and treated in a Subtitle C treatment facility; residual metals and ash would be solidified and disposed off-site in a Subtitle C disposal facility.

The Preferred Alternative and Evaluation of Alternatives.

- Identify the preferred alternative, emphasizing that the selection of this alternative is preliminary and could change as a result of public comments and other new information. Sample text is presented in **Highlight 2**.

Highlight 2: Stating the Preferred Alternative

The preferred alternative is alternative number 9. Alternative 9 includes excavation, on-site incineration of contaminated soils, solidification, and off-site disposal of residual metals and ash. Based on new information or public comments, EPA, in consultation with the State of Tennessee, may modify the preferred alternative or select another response action presented in this Plan and the RI/FS Report. The public, therefore, is encouraged to review and comment on all of the alternatives identified in this Proposed Plan. The RI/FS Report should be consulted for more information on these alternatives.

- Introduce the nine evaluation criteria against which the alternatives are evaluated. The nine criteria are summarized below:

  Overall protection of human health and the environment addresses whether or not a remedy provides adequate protection and describes how risks posed through each pathway are eliminated, reduced or controlled through treatment, engineering controls, or institutional controls.

  Compliance with ARARs addresses whether or not a remedy will meet all of the applicable or relevant and appropriate requirements of other Federal and State environmental statutes and/or provides grounds for invoking a waiver.

  Long-term effectiveness and permanence refers to the ability of a remedy to maintain reliable protection of human health and the environment over time once cleanup goals have been met.

  Reduction of toxicity, mobility, or volume is the anticipated performance of the treatment technologies a remedy may employ.

  Short-term effectiveness addresses the period of time needed to achieve protection, and any adverse impacts on human health and the environment that may be posed during the construction and implementation period until cleanup goals are achieved.

  Implementability is the technical and administrative feasibility of a remedy, including the availability of materials and services needed to implement a particular option.

  Cost includes estimated capital and operation and maintenance costs, and net present worth costs.

  State Acceptance indicates whether, based on its review of the RI/FS and Proposed Plan, the State concurs in, opposes, or has no comment on the preferred alternative at the present time.

  Community Acceptance will be assessed in the Record of Decision following a review of the public comments received on the RI/FS report and the Proposed Plan.

- Summarize the performance of the preferred alternative against the nine criteria, explaining how it compares to the other alternatives. This describes the basis for the preliminary preference.

Highlight 3: Presenting the Evaluation of Alternatives

Short-term effectiveness.

Alternative number 9 uses a treatment process and an on-site landfill that contains the contaminated soils and reduces the possibility of direct human contact with contaminants more quickly than all of the other alternatives except Alternative number 7. Under the preferred alternative, once the volatile organics have been collected in canisters, there is some minor short-term risk of exposure to the community during transportation of the canisters to a disposal site.

Because the capacity of on-site and off-site incinerators is limited, under Alternatives number 10 and 11 contaminated soils would be stockpiled for up to six years. Under these two alternatives, the risks of direct contact with stockpiled contaminated soils would be increased until incineration has been completed. In addition, there are some risks of exposure to air emissions from the incinerators.

- Present the lead agency's preliminary determination that the preferred alternative provides the best balance of trade-offs with respect to the nine criteria. If selected, the preferred alternative is anticipated to meet the following statutory requirements to:

  - Protect human health and the environment;
  - Attain ARARs (except when a waiver is invoked);
  - Be cost-effective;
  - Utilize permanent solutions and alternative treatment (or resource recovery) technologies to the maximum extent practicable; and

Highlight 4: Summarizing the Statutory Findings

In summary, at this time the preferred alternative is believed to provide the best balance of trade-offs among alternatives with respect to the criteria used to evaluate remedies. Based on the information available at this time, therefore, EPA and the State of Tennessee believe the preferred alternative would be protective, would attain ARARs, would be cost-effective, and would utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable.

Community Involvement.

The Proposed Plan is a public participation decision document. It should include information that helps people determine how they can be involved. To this end, the Plan should:

- Provide notice of the dates of the public comment period;
- Note the date, time, and location of public meeting(s) (or offer to hold one);
- Identify lead and support agency contact people;
- State whether a special notice has been issued to the PRPs (if applicable); and
- List the location of the administrative records and information repositories.

EPA

A Guide to Developing Superfund Records of Decision

July 1988

The Record of Decision (ROD) is issued by EPA as the final remedial action plan for a site or operable unit. The ROD summarizes problems posed by a site, the alternative ways that were considered for addressing those problems, and the comparative analysis of th alternatives against nine evaluation criteria. The ROD then presents the selected remedy and provides the rationale for that selecti specifically explaining how the remedy satisfies the requirements of CERCLA section 121(b).

This guide provides ROD preparers with a quick reference to the essential ROD components. The information to be included in each o three major sections of a ROD is summarized below. Close attention should be given to the sections in which alternatives are described, information is presented, the comparative analysis against the nine evaluation criteria is summarized, and in which the statu determinations are made. Additional information on ROD preparation is provided in chapters 6 and 7 of the draft ROD guidance (OSW Directive 9355.3-02).

THE DECLARATION

The Declaration is a formal statement, signed by the RA or AA, identifying the selected remedy and indicating that the selection was carr out in accordance with the statutory and regulatory requirements of the Superfund program. The State Director may also sign the Declarat if appropriate. The Declaration should be approximately two pages long and should include the information provided in **Highlight 1.**

Highlight 1: Outline and Sample Language for the Declaration of the Record of Decision

Site Name and Location

Statement of Basis and Purpose

"This decision document presents the selected remedial action for the _[site]_, in _[location]_, developed in accordance with CERCLA, as amended by SARA, and, to the extent practicable, the National Contingency Plan. This decision is based on the administrative record for this site. The attached index identifies the items that comprise the administrative record upon which the selection of the remedial action is based."

The State/Commonwealth of ____________________ has concurred in the selected remedy.

Description of the Selected Remedy

☐ Describe the role of this operable unit within the overall site strategy (does it address the principal threats posed by the site?)

☐ Describe the major components of the selected remedy in bulleted fashion.

Declaration

☐ When the selected remedy satisfies the statutory preference for treatment as a principal element, either total treatment or a combination of containment and treatment of the principal threat(s) at the site, the Declaration should state:

"The selected remedy is protective of human health and the environment, attains Federal and State requirements that are applicable or relevant and appropriate for this remedial action [or "a waiver can be justified for whatever Federal and State applicable or relevant and appropriate requirement that will not be met"], and is cost-effective. This remedy satisfies the statutory preference for remedies that employ treatment that reduces toxicity, mobility, or volume as a principal element and utilizes permanent solutions and alternative treatment (or resource recovery) technologies to the maximum extent practicable."

(or)

☐ When a remedy involving little or no treatment is selected (treatment is not utilized to address the principal threat), CERCLA, as amended by SARA, requires a statement explaining why a remedial action involving such reductions was not selected. The Declaration should state:

"The selected remedy is protective of human health and the environment, attains Federal and State requirements that are applicable or relevant and appropriate to the remedial action [or "a waiver can be justified for whatever Federal and State applicable or relevant and appropriate requirement that will not be met"], and is cost-effective. This remedy utilizes permanent solutions and alternative treatment (or resource recovery) technologies to the maximum extent practicable for this site. Because treatment of the principal threats of the site was not found to be practicable [or "within the limited scope of this action"], however, this remedy does not satisfy the statutory preference for treatment as a principal element of the remedy."

☐ If the remedy will leave hazardous substances on-site above health-based levels, the Declaration should include the following:

"Because this remedy will result in hazardous substances remaining on-site above health-based levels, a review will be conducted within five years after commencement of remedial action to ensure that the remedy continues to provide adequate protection of human health and the environment."

(or)

☐ If the remedy will not leave hazardous substances on-site above health-based levels, the Declaration should include the following:

"Because this remedy will not result in hazardous substances remaining on-site above health-based levels, the five-year facility review will not apply to this action."

____
(Signature of Assistant/Regional Administrator)

____
(Signature of State Director (if appropriate))

Date ________________________________

(Note: Attach the State's letter of concurrence to the Record of Decision package)

THE DECISION SUMMARY

The Decision Summary provides an overview of the problems posed by the site, the alternatives evaluated, and the analysis of those options. The Decision Summary explains the rationale for the selection and how the selected remedy meets the statutory requirements. The information to be presented in each of the sections of the Decision Summary is outlined below.

Site Name, Location, and Description. Briefly describe the site in terms of:

☐ Name, location, address (include maps or site plan as appropriate);
☐ Area of site, topography, if located in a floodplain;
☐ Adjacent land uses;
☐ Natural resource use;
☐ Location and distance to nearby populations;
☐ General surface water and ground water resources; and
☐ Surface and subsurface features (e.g., number and volume of tanks, lagoons, structures, and drums).

Site History and Enforcement Activities. Summarize the following:

☐ History of site activities that led to current problems;
☐ History of Federal and State site investigations and remedial actions conducted under CERCLA or other authorities; and
☐ History of CERCLA enforcement activities at the site, including:
  -Whether special notice has been issued to PRPs;
  -If a moratorium has commenced;
  -Results of negotiations, if they can be publicized;
  -Whether a lawsuit has been filed regarding cleanup of the site (provide court and docket number); and
  -If technical discussions with PRPs are summarized in the administrative record.

Community Relations History. Summarize the major community relations activities:

☐ How the public participation requirements under sections 113(k)(2)(i-v) and 117 were satisfied during the remedial process.

Note: Community response to the selected remedy should be addressed under the "community acceptance" criterion in the Comparative Analysis section of the ROD. Responses to community concerns will be addressed in the Responsiveness Summary of the ROD.

Scope and Role of Operable Unit or Response Action Within Site Strategy.

☐ Summarize the scope of the problem(s) addressed by the remedial action. Will it address any of the principal threats?
☐ Describe the role of the action within the overall site remediation strategy (operable unit or response action).

Note: The Statutory Determinations section of the ROD must explain whether or not the selected remedy satisfies the statutory preference for remedies employing treatment that reduces toxicity, mobility, or volume as a principal element. By indicating whether the principal threat(s) will be addressed by the action, the Scope and Role section will provide the basis for this determination.

Summary of Site Characteristics. Highlight the following factors:

☐ Contamination and affected media, including:
  -Types and characteristics of contaminants (e.g., toxicity, mobility);
  -Quantities of contaminants; and
  -Concentrations of contaminants;
☐ Known or suspected sources of contamination; and
☐ Location of contamination and known or potential routes of migration:
  -Lateral and vertical extent of contamination; and
  -Potential surface and subsurface pathways of migration.

Summary of Site Risks. Summarize the results of the baseline risk assessment conducted for the site.

☐ Identify contaminants of concern (indicator chemicals);
☐ Summarize results of the exposure assessment;
☐ Summarize the toxicity assessment of contaminants of concern;
☐ Summarize risk characterization:
  -Potential or actual carcinogenic risks;
  -Noncarcinogenic risks;
  -Environmental risks; and
☐ Describe analytic methods used in making the risk calculations.

Note: This summary of the baseline risks provides the rationale for the lead agency's undertaking a response action or taking no action.

Documentation of Significant Changes. CERCLA section 117(b) requires an explanation of any significant changes from the preferred alternative originally presented in the Proposed Plan. If the selected remedy reflects significant changes from the preferred alternative, the ROD should:

☐ Identify the preferred alternative presented in the Proposed Plan;
☐ Describe the significant changes; and
☐ Explain the reason(s) for such changes.

Description of Alternatives. The objective of this section is to provide an understanding of the alternative waste management strategies developed for the site and their specific components. Each alternative should be described in terms of the components listed below. Figure 1 highlights elements of remedies to be addressed in this section.

☐ **Treatment components**, including:
  - Treatment technologies that will be used;
  - Type and volume of waste treated;
  - Contaminated media addressed;
  - Process sizing;
  - Treatment levels (e.g., Land Ban, percentage of order of magnitude reductions expected, MCLs, etc.);
  - Residual levels (e.g., clean closure, NPDES, delisting);
  - Implementation requirements; and
  - Assumptions, limitations, and uncertainties.
☐ **Containment Components**, including:
  - Type and quantity of waste(s) to be contained;
  - Quality of untreated waste and treatment residuals to be contained in terms of the type or degree of risk they pose; and
  - Type of closure that will be implemented.
☐ **Institutional controls**, including short-term controls during remediation and long-term controls as part of O & M.

- ☐ **Groundwater classification, e.g., Class I, II, or III**
- ☐ **Estimated time for implementation**
- ☐ **Estimated capital, O & M, and present worth costs.**
- ☐ **The major ARARs associated with the various components of the waste management strategy (e.g., Subtitle C closure requirements, MCLs for ground-water remediation) should be incorporated into the description of the alternatives to the extent possible. In addition, the CERCLA off-site policy should be discussed where applicable.**

Summary of Comparative Analysis of Alternatives. In this section, summarize the relative performance of the alternatives by highlighting the key differences among the alternatives in relation to the nine evaluation criteria. An effective way of organizing this section is to present a series of paragraphs headed by each criterion. Under each criterion, the alternative that performs best in that category should be discussed first, with other options discussed in sequence. Refer to the RI/FS and ROD guidance documents for additional information on the factors included in each of the nine criteria. These factors should be addressed, when appropriate, in the alternative descriptions. The nine evaluation criteria are summarized below.

Overall protection of human health and the environment addresses whether or not a remedy provides adequate protection and describes how risks posed through each pathway are eliminated, reduced, or controlled through treatment, engineering controls, or institutional controls.

Compliance with ARARs addresses whether or not a remedy will meet all of the applicable or relevant and appropriate requirements of other environmental statutes and/or provide grounds for invoking a waiver.

Long-term effectiveness and permanence refers to the ability of a remedy to maintain reliable protection of human health and the environment over time, once cleanup goals have been met.

Reduction of toxicity, mobility, or volume is the anticipated performance of the treatment technologies a remedy may employ.

Short-term effectiveness addresses the period of time needed to achieve protection and any adverse impacts on human health and the environment that may be posed during the construction and implementation period, until cleanup goals are achieved.

Implementability is the technical and administrative feasibility of a remedy, including the availability of materials and services needed to implement a particular option.

Cost includes estimated capital and operation and maintenance costs, and net present worth costs.

State Acceptance should be used to address the suppor agency's comments. Where the State or Federal agency is the lead for the ROD, EPA's acceptance of the selected remed should be addressed under this criterion.

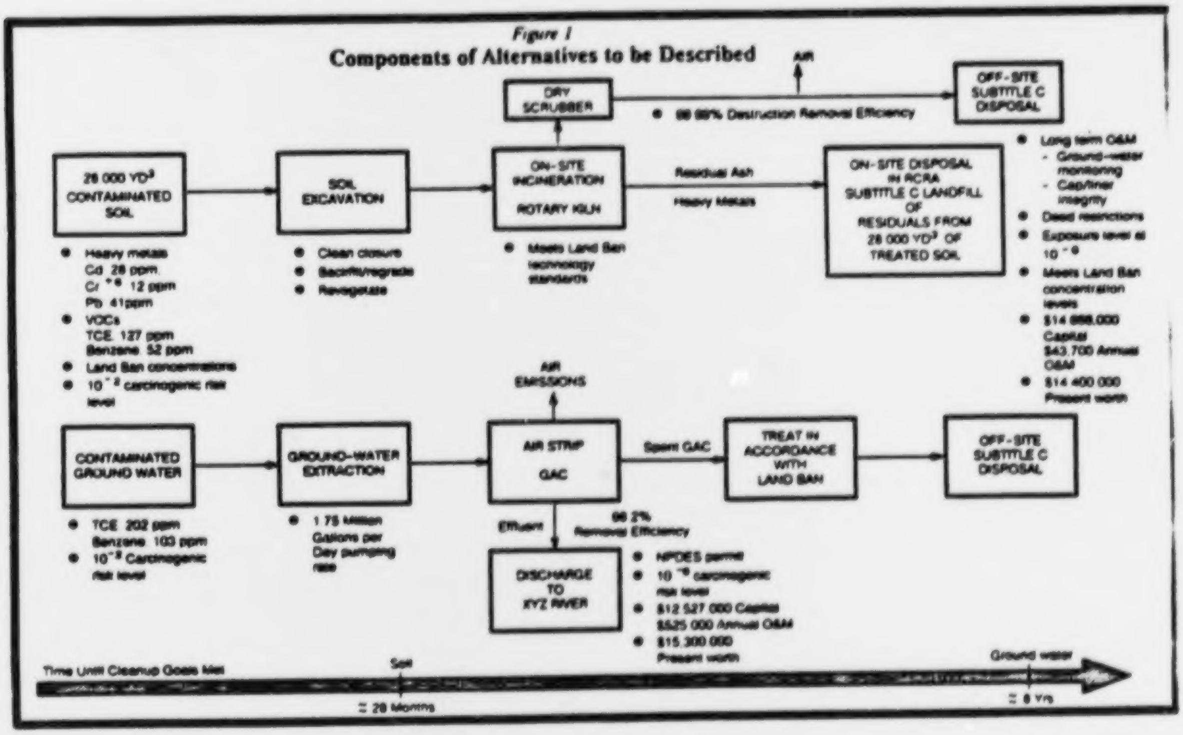
Community Acceptance summarizes the public's genera response to the alternatives described in the Proposed Plar and RI/FS report. The specific responses to public comment should be addressed in the Responsiveness Summary sectior of the ROD.

Notes: In addressing the long-term effectiveness and permanence of an alternative, the term "permanence" should be used carefully. Permanence is viewed along a continuum; an alternative can be described as offering a greater or lesser degree of permanence. The term "permanent remedy" should refer onl to those alternatives that require no long-term management o wastes.

Only reductions achieved through treatment should be addresse under the "reduction of toxicity, mobility or volume" criterion Reductions of mobility accomplished through containmen should be addressed under "overall protection of human healt and the environment."

Figure 1

Components of Alternatives to be Described


Air
DRY SCRUBBER
99.99% Destruction Removal Efficiency
OFF-SITE SUBTITLE C DISPOSAL
28 000 YD^3 CONTAMINATED SOIL
SOIL EXCAVATION
ON-SITE INCINERATION
ROTARY KILN
Residual Ash
Heavy Metals
ON-SITE DISPOSAL IN RCRA SUBTITLE C LANDFILL OF RESIDUALS FROM 28 000 YD^3 OF TREATED SOIL
Long term O&M
- Ground-water monitoring
- Cap/liner integrity
Deed restrictions
Exposure level at 10^{-6}
Meets Land Ban concentration levels
$14 888,000 Capital
$43,700 Annual O&M
$14 400 000 Present worth
Heavy metals
Cd 28 ppm
Cr^{+6} 12 ppm
Pb 41ppm
VOCs
TCE 127 ppm
Benzene 52 ppm
Land Ban concentrations
10^{-2} carcinogenic risk level
Clean closure
Backfill/regrade
Revegetate
Meets Land Ban technology standards
AIR EMISSIONS
CONTAMINATED GROUND WATER
GROUND-WATER EXTRACTION
AIR STRIP
GAC
Spent GAC
TREAT IN ACCORDANCE WITH LAND BAN
OFF-SITE SUBTITLE C DISPOSAL
TCE 202 ppm
Benzene 103 ppm
10^{-2} Carcinogenic risk level
1.75 Million Gallons per Day pumping rate
Effluent
98.2% Removal Efficiency
DISCHARGE TO XYZ RIVER
NPDES permit
10^{-6} carcinogenic risk level
$12 527 000 Capital
$525 000 Annual O&M
$15,300 000 Present worth
Time Until Cleanup Goals Met
Soil
≅ 28 Months
Ground water
≅ 8 Yrs

The Selected Remedy. In this section of the ROD, identify the selected remedy and state:

- ☐ The cancer risk level to be attained and the rationale for it; and
- ☐ As appropriate, locations where performance levels will be attained, *for the media addressed* (e.g., MCLS will be met at the edge of the waste management area.)

The Statutory Determinations. The remedy selected must satisfy the requirements of section 121 of CERCLA to:

- ☐ Be protective of human health and the environment;
- ☐ Attain ARARs (or explain rationale for invoking a waiver);
- ☐ Be cost-effective;
- ☐ Utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable; and
- ☐ Address whether the preference for treatment that reduces toxicity, mobility, or volume as a principal element is satisfied.

A description of how the selected remedy satisfies each of the statutory requirements should be provided. Points to address for each of these are presented in **Highlight 2**.

THE RESPONSIVENESS SUMMARY

The final component of the ROD package is the Responsiveness Summary, which serves two purposes. First, it provides lead agency decision-makers with information about community preferences regarding both the remedial alternatives and general concerns about the site. Second, it demonstrates to members of the public how their comments were taken into account as an integral part of the decision-making process.

Guidance on preparing Responsiveness Summaries is available in Community Relations in Superfund: A Handbook (OSWER Directive 9230.0-3B). That document details the process of preparing the Summary and includes a sample Responsiveness Summary.

Highlight 2: The Statutory Determinations

Protection Of Human Health And The Environment.

- ☐ Describe how the selected remedy will eliminate, reduce, or control risks posed through each pathway to ensure adequate protection of human health and the environment.
- ☐ Indicate that no unacceptable short-term risks or cross-media impacts will be caused by implementation of the remedy.

Attainment of ARARs.

- ☐ State whether the selected remedy will attain all applicable or relevant and appropriate requirements. When appropriate, state the waiver that is being invoked and the grounds for the waiver.
- ☐ List and describe the Federal and State ARARs that the selected remedy will attain, distinguishing applicable from relevant and appropriate requirements as necessary.
- ☐ List and provide the rationale for using any "to be considereds."

Note: In listing ARARs the specific section of the statute or regulation that contains the requirement should be cited and a brief synopsis of the requirement should be provided.

Cost Effectiveness.

- ☐ Describe how the selected remedy provides overall effectiveness proportionate to its costs such that it represents a reasonable value for the money.

Utilization of Permanent Solutions and Alternative Treatment Technologies or Resource Recovery Technologies to the Maximum Extent Practicable ("MEP").

- ☐ Explain the overall rationale for the remedy selection, that is, how the remedy was judged to provide the best balance of trade-offs among the alternatives examined in detail with respect to the nine evaluation criteria. This explanation should highlight the performance of the selected remedy against the criteria deemed most important for the site to clarify why:

  The remedy was determined to be the most appropriate solution for the site.

  The remedy represents the maximum extent to which permanent solutions and treatment can be practicably utilized for this action.

  Note: This is a statutory requirement that must be met by all remedies. In explaining the selection of remedies that involve little or no treatment, the impracticability of treatment should be discussed or it should be acknowledged that treatment was not within the limited scope of the action.

Preference for Treatment as a Principal Element.

- ☐ Describe how the preference for treatment is satisfied if the remedy uses treatment to address the principal threats posed by the site.
- ☐ Explain why the preference is not satisfied if treatment is not used to address the principal threats. This explanation will either describe how the operable unit or response action does not encompass the principal threats, or why treatment of the principal threats was not found to be practicable or within the limited scope of the action.

United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

Directive: 9347.3-01FS
July 1989

EPA

Superfund LDR Guide #1

Overview of RCRA Land Disposal Restrictions (LDRs)

The Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA) - - P.L. 98-616, signed on November 8, 1984 - - include specific provisions restricting the land disposal of RCRA hazardous wastes. The purpose of these HSWA provisions is to minimize the potential of future risk to human health and the environment by requiring the treatment of hazardous wastes prior to their land disposal. **This guide summarizes the major components of the land disposal restrictions (LDRs), outlines the types of restrictions imposed, and presents the compliance options specified in the regulation.** Other Superfund LDR Guides are listed at the end of this guide. More detailed guidance on Superfund compliance with the LDRs is being prepared by the Office of Solid Waste and Emergency Response (OSWER).

DEFINITION OF LAND DISPOSAL

The LDRs place restrictions on the land disposal of RCRA hazardous wastes. The definition of land disposal (or "placement," which is synonymous with "land disposal") under RCRA includes, but is not limited to:

> *any "placement" of hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, underground mine or cave, and concrete bunker or vault.* (RCRA §3004(k))

The LDRs apply only to RCRA hazardous wastes that are land disposed or placed. They do not apply to wastes that are discharged to surface waters (where National Pollutant Discharge Elimination System (NPDES) requirements apply) or to Publicly Owned Treatment Works (where pretreatment requirements apply). The LDRs also do not apply to contaminated ground water treated and supplied directly to households (where Maximum Contaminant Levels (MCLs) generally apply).

It is important to note that the LDRs apply prospectively to wastes that are land disposed after the effective date of the restrictions (i.e., the LDRs do not require that wastes land disposed prior to the date of the restrictions be removed and treated).

STATUTORY DEADLINES

HSWA directed EPA to establish treatment standards for each of seven groups of RCRA hazardous wastes by specific dates. These dates, referred to as statutory deadlines, will eventually restrict land disposal of all RCRA hazardous wastes, as shown in **Highlight 1**.

Highlight 1: LDR STATUTORY DEADLINES

Waste	Statutory Deadline
Spent Solvent and Dioxin-Containing Wastes	November 8, 1986
California List Wastes	July 8, 1987
First Third Wastes	August 8, 1988
Spent Solvent, Dioxin-Containing, and California List Soil and Debris From CERCLA/RCRA Corrective Actions	November 8, 1988
Second Third Wastes	June 8, 1989
Third Third Wastes	May 8, 1990
Newly Identified Wastes	Within 6 months of identification as a hazardous waste

The statutory deadlines are important because they are the dates on which RCRA wastes become "restricted," although EPA has the authority to restrict a waste before its statutory deadline. For example, the Agency has restricted certain Second Third wastes in the First Third rule and certain Third Third wastes in the June 1989 Second Third rule.

STATUTORY WASTE CATEGORIES

The first category of wastes (refer to **Highlight 1**) includes: the F001-F005 spent solvent-containing RCRA wastes and the F020-F023 and F026-F028 dioxin-containing RCRA wastes. The second category, the California list wastes, is a distinct category of RCRA hazardous wastes described further in Superfund LDR Guide #2. The three categories of scheduled wastes (i.e., First Third, Second Third, Third Third wastes) include all listed and characteristic hazardous wastes identified as of November 8, 1984 (excluding the solvent and dioxin wastes mentioned above). EPA ranked the scheduled wastes based on their toxicity and volume and placed the highest toxicity/volume wastes in the "First Third." Soil and debris (see **Highlight 2**) contaminated with spent solvent- or dioxin-containing and California list wastes generated during CERCLA response and RCRA corrective actions were given a separate statutory deadline. Finally, wastes newly identified or listed after 1984 must have standards set within six months of their identification or listing as a hazardous waste.

Highlight 2: DEFINITIONS OF SOIL AND DEBRIS

Soil is defined as materials that are primarily of geologic origin such as sand, silt, loam, or clay that are indigenous to the natural geological environment at or near the CERCLA site. (In many cases, soil is mixed with liquids, sludges, and/or debris.)

Debris is defined as materials that are primarily non-geologic in origin such as grass, trees, stumps, and man-made materials such as concrete, clothing, partially buried whole or empty drums, capacitors, and other synthetic manufacturing items, such as liners. (It does not include synthetic organic chemicals, but may include materials contaminated with these chemicals.)

TYPES OF LDR RESTRICTIONS

As discussed above, a RCRA hazardous waste becomes "restricted" under the LDRs on its statutory deadline (or earlier if EPA promulgates the restriction ahead of schedule). On that date, one of four types of restrictions will apply:

1. Treatment standards: EPA may set one of three types of treatment standards for restricted wastes:

   - A concentration level to be achieved prior to disposal (the most common type of treatment standard);
   - A specified technology to be used prior to disposal; or
   - A "no land disposal" designation when the waste is no longer generated, is totally recycled, is not currently being land disposed, or no residuals are produced from treatment.

   All three types of treatment standards are established based on the best demonstrated available technology (BDAT) identified for that waste.

2. Minimum technology requirements during a national capacity extension: When EPA sets a treatment standard, it may grant a national capacity extension (for up to two years) if sufficient treatment capacity is not available for that waste. During a national capacity extension, the treatment standards set for a waste do not have to be met. However, if wastes that do not meet the standards are disposed of in a landfill or surface impoundment, the receiving unit must meet the RCRA minimum technology requirements (i.e., double liner, leachate collection system, and ground-water monitoring).

   When EPA sets treatment standards for Third Third wastes in May 1990, it may grant a national capacity extension, but only for up to two years. Therefore, by May 1992, all national capacity extensions will have expired. The only exception may be if EPA grants an extension when it sets treatment standards for newly identified wastes. Superfund LDR Guide #3 provides additional information on the minimum technology requirements.

3. Soft hammer restrictions: If EPA fails to set a treatment standard for a First or Second Third

waste by its statutory deadline, soft hammer restrictions apply. The soft hammer requirements place the following restrictions on the disposal of wastes in landfills and surface impoundments:

- The receiving unit must meet minimum technology requirements; and
- The site manager (as a generator) must determine if treatment is practically available. If treatment is practically available, the site manager must use the best practically available treatment to treat wastes before disposal; if treatment is not practically available, the wastes may be disposed of without treatment.

Land disposal in other types of units, such as land treatment units and waste piles, is not restricted under soft hammers, although an LDR notification will be required for actions involving off-site disposal in such units.

Soft hammer restrictions remain in effect until EPA sets a treatment standard, or until May 1990, when the hard hammer restrictions become effective.

4. Hard hammer restrictions: If EPA fails to set a treatment standard by the statutory deadlines for solvent- and dioxin-containing and California list wastes, or by May 8, 1990, for any of the scheduled wastes, the hard hammer restrictions prohibit all land disposal of the affected waste until a treatment standard is promulgated. To date, the hard hammer has only fallen for certain California list wastes.

   Superfund LDR Guide #4 provides more information on soft and hard hammer restrictions.

LDR COMPLIANCE OPTIONS

EPA recognizes that not all wastes can be treated to the LDR treatment standards and that alternative treatment standards and methods of land disposal may provide significant reduction in the toxicity, mobility, or volume of wastes and be protective of human health and the environment. The LDRs, therefore, provide the following compliance options to meeting the restrictions discussed above.

- Treatability Variance: This option is available when EPA has set a treatment standard as a concentration level, but because a generator's waste differs significantly from the waste used to set the standard, the promulgated treatment standard cannot be met or the BDAT technology is inappropriate for that waste. (For the purposes of the LDRs, CERCLA site managers are considered generators of hazardous waste.) Under a Treatability Variance, EPA approves an alternate treatment standard that must be met before that waste can be land disposed. Superfund LDR Guides #6A and #6B provide more information for ob taining Treatability Variances for remedial and removal actions.
- Equivalent Treatment Method Petition: This option is available when EPA has set a treatment standard that is a specified technology (e.g., incineration). Generators may use a different technology (e.g., chemical treatment) if they can demonstrate that this technology will achieve a measure of performance equivalent to that of the specified technology.
- No Migration Petition: This option may be used to meet any of the four types of LDR restrictions. Under this option, generators may land dispose wastes that do not meet the LDR restrictions if they can demonstrate that there will be "no migration" of hazardous constituents above health-based levels from the disposal unit or injection zone for as long as the wastes remain hazardous.
- Delisting. This option may be used to demonstrate that a waste is nonhazardous and, therefore, not subject to any of the RCRA Subtitle C hazardous waste regulations, including the LDRs. Delisting only applies when the CERCLA waste is a listed RCRA hazardous waste. (Characteristic wastes need not be delisted, but they can be treated to no longer exhibit the characteristic.) Generators must demonstrate that: (1) the waste does not meet any of the criteria for which the waste was listed as a hazardous waste, and (2) other factors (including additional constituents) do not cause the waste to be hazardous.

The LDRs also permit a case-by-case extension of up to two years, which allows a site-specific extension of the effective date if a generator has a binding contractual commitment for treatment capacity and can show that no capacity currently exists anywhere in the United States. This option, however, is generally not appropriate for Superfund response actions.

SOIL AND DEBRIS WASTES

As discussed earlier, the LDRs apply to soil and debris when they are contaminated with a restricted RCRA hazardous waste. Because of the complex nature of many soil and debris matrices (as compared with the industrial process wastes upon which the LDR treatment standards were based), it may be difficult to meet these standards for wastes mixed with soil and debris. Consequently, the Agency is undertaking a rulemaking that will set LDR treatment standards specifically for soil and debris. Until that rulemaking is completed, however, site managers may need to obtain a Treatability Variance.

OTHER LDR REQUIREMENTS

In addition to the four types of restrictions described above, the LDRs also include the following requirements:

- Storage Prohibition: The LDRs prohibit the storage of restricted wastes (including soft hammer wastes) unless storage is solely for the purpose of accumulating sufficient quantities of wastes to facilitate proper treatment, recovery, or disposal. For periods of up to one year, the burden is generally on EPA to prove that storage is not needed to facilitate proper treatment, recovery, or disposal; after one year, the burden of proof shifts to the storage facility. Temporary storage used during CERCLA actions to facilitate proper disposal (e.g., storage while awaiting sampling results, or while selecting and designing a remedy) is allowable under the storage prohibition.
- Exemption for Treatment in Surface Impoundments: Placing untreated wastes in surface impoundments (that meet the minimum technology requirements) for treatment is permissible, provided the treatment residues that do not meet the LDR treatment standards or prohibition levels are removed for subsequent management (through any treatment other than treatment in another surface impoundment) within one year of placement into the surface impoundment.
- Dilution Prohibition: Dilution of a waste as a means to comply with the LDRs is prohibited. However, "dilution" that is part of treatment (e.g., mixing for immobilization) is permissible.

The LDRs also establish requirements for testing, notification, and certification of compliance.

- Testing: Once it is determined that a waste is restricted under the LDRs, generators, treatment facilities, or disposal facilities must test the waste at a frequency specified in the facility's waste analysis plan to demonstrate compliance with LDR treatment standards or California list prohibition levels prior to land disposal.
- Notification: All restricted wastes that are shipped to an off-site treatment, storage, or disposal facility must be accompanied by a notification that includes the EPA hazardous waste number and the applicable LDR restriction that is in effect for those wastes.
- Certification: A treatment facility must certify that the LDR treatment standards have been attained before a restricted waste is land disposed off-site. (There are also certification requirements specifically for soft hammer wastes; see Superfund LDR Guide #4.)

OTHER AVAILABLE SUPERFUND/LDR GUIDES

#2 Complying with the California List Restrictions Under LDRs

#3 Treatment Standards and Minimum Technology Requirements Under LDRs

#4 Complying With the Hammer Restrictions Under LDRs

#5 Determining When LDRs are Applicable to CERCLA Response Actions

#6A Obtaining a Soil and Debris Treatability Variance for Remedial Actions

#6B Obtaining a Soil and Debris Treatability Variance for Removal Actions*

#7 Determining When LDRs Are Relevant and Appropriate to CERCLA Response Actions*

***Currently being prepared in OSWER**

EPA

United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

Directive: 9347.3-02FS
July 1989

Superfund LDR Guide #2

Complying With the California List Restrictions Under Land Disposal Restrictions (LDRs)

The Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA) include specific restrictions on the land disposal of RCRA hazardous wastes. California list wastes are a distinct category of RCRA hazardous wastes that are restricted under the land disposal restrictions (LDRs). **This guide defines the California list wastes, summarizes their respective restrictions, and discusses their potential overlap with other LDR treatment standards.** More detailed guidance on California list waste restrictions and Superfund compliance with the LDRs is being prepared by the Office of Solid Waste and Emergency Response (OSWER).

DEFINITION OF CALIFORNIA LIST WASTES

To be classified as a California list waste, three conditions must be met;

(1) The waste must be a RCRA listed or characteristic waste;

(2) The waste must be a liquid (i.e., it fails method 9095 Paint Filter Liquids Test [PFLT]), except for Halogenated Organic Compounds (HOCs), which may be liquid or non-liquid; and

(3) The waste must exceed statutory prohibition levels for specified constituents.

The types of wastes that may be California list wastes are: free cyanides, certain metals, corrosive wastes, PCBs, and HOCs. (HOCs are compounds containing carbon and a halogen, such as fluorine, chlorine, bromine, iodine, and astatine, in their molecular formula). The Agency has limited the restricted HOCs to approximately 100 HOCs listed in Appendix III to 40 CFR Part 268. These restricted HOCs include solvents, pesticides, PCBs, and dioxins.

These hazardous wastes are referred to as California list wastes because the State of California developed regulations to restrict the land disposal of wastes containing these constituents, and Congress subsequently incorporated these provisions into the 1984 HSWA amendments to RCRA. Even if LDR treatment standards have not been promulgated for certain RCRA wastes (e.g., Third Third wastes), these wastes may be subject to California list restrictions. If the Agency has promulgated a treatment standard for a California list hazardous waste, the waste must attain that treatment standard before land disposal. If the Agency has not set a treatment standard, the waste must be treated to below the prohibition level (or rendered non-liquid if a non-HOC waste) before it may be land disposed.

CALIFORNIA LIST LDR RESTRICTIONS

The Agency has promulgated treatment standards for PCB-containing wastes and HOC-containing wastes (except for dilute HOC wastewaters). The treatment standards for PCBs and some HOCs became effective on July 8, 1987.

The Agency has not set treatment standards for the remaining California list wastes. Instead, the Agency codified the statutory prohibition levels for corrosive wastes and dilute HOC wastewaters and allowed the hard hammer provisions to take effect for free cyanides and California list metals. The prohibitions on these wastes became effective on July 8, 1987. The effects of these restrictions are the same: prohibiting the land disposal of these wastes above the prohibition levels.

Based on a finding of inadequate treatment capacity, EPA granted a nationwide extension to the effective date for treating California list HOC wastes until July 8, 1989. The Agency subsequently rescinded the variance, and the restriction for HOC wastes became effective November 8, 1988. The Agency also granted an extension of the effective date for HOC-containing soil and debris wastes until July 8, 1989, for soil and debris wastes not from CERCLA/RCRA corrective actions, and until November 8, 1990, for soil and debris wastes from CERCLA/RCRA corrective actions. California list wastes granted a national capacity variance from the treatment standards may be disposed of in a landfill or surface impoundment only if the receiving unit complies with minimum technology requirements (See Superfund LDR Guide #3). The prohibition levels, treatment standards, and effective dates for the California list wastes are presented in **Highlight 1**.

OVERLAP WITH OTHER TREATMENT STANDARDS

As noted earlier, wastes must be RCRA listed or characteristic wastes to be California list wastes. Therefore, California list wastes may also be restricted as solvent- or dioxin-containing wastes or as scheduled wastes. For wastes covered by more than one LDR standard, the LDR restrictions for the more specific waste stream generally take precedence, once the standard is promulgated. For example, F006 nonwastewaters may be restricted under the California list rule because the waste is a liquid and may contain nickel above the statutory prohibition level. The F006 treatment standard, which is expressed as a concentration level, however, takes precedence over the California list restriction (i.e., codified prohibition level).

The Agency has determined that soft hammer wastes and wastes for which national capacity variances have been granted **remain subject to California list prohibitions** (i.e., if either of these waste types is subject to a California list treatment standard or statutory prohibition level, that treatment standard or statutory level must be met before the waste can be land disposed). If a California list treatment standard is promulgated for a soft hammer waste, the more stringent of the restrictions apply. For example, if a non-liquid soft hammer waste contains 1,100 mg/kg total HOCs, the waste must meet the California list treatment standard of incineration or burning in a boiler or industrial furnace before land disposal. If a liquid soft hammer waste contains 510 mg/l lead (for which no California list treatment standard exists), the soft hammer restrictions apply. If treatment is not available, the waste must at least be treated below the prohibition level (i.e., 500 mg/l) or rendered non-liquid and can only be disposed of in a surface im-poundment or landfill if the receiving unit meets minimum technology requirements or has an equivalent waiver.

Highlight 1 - PROHIBITION LEVELS AND TREATMENT STANDARDS FOR CALIFORNIA LIST WASTES

California List Constituent	Prohibition Level	Treatment Standard	Effective Date
Free Cyanides	1000 mg/l	NONE -- hard hammer	July 8, 1987
Metals		NONE -- hard hammer	July 8, 1987
Arsenic	500 mg/l		
Cadmium	100 mg/l		
Chromium VI	500 mg/l		
Lead	500 mg/l		
Mercury	20 mg/l		
Nickel	134 mg/l		
Selenium	100 mg/l		
Thallium	130 mg/l		
Corrosives	pH < 2.0	NONE -- Codified prohibition levels	July 8, 1987
PCBs			
≥ 500 ppm	50 ppm	INCINERATION as specified under TSCA, 99.9999% DRE	July 8, 1987
≥ 50 ppm and < 500 ppm	50 ppm	INCINERATION OR THERMAL DESTRUCTION in Boiler, 99.9999% DRE	July 8, 1987
Halogenated Organic Compounds (HOCs)			
Dilute Wastewaters (<10,000 mg/kg)	1000 mg/kg	NONE -- Codified prohibition levels	July 8, 1987
Non-Dilute Wastewaters and Non-Liquids	1000 mg/kg	INCINERATION 99.99% DRE	Nov. 8, 1988
Non-RCRA/CERCLA Soil and Debris	1000 mg/kg	INCINERATION 99.99% DRE	July 8, 1989
RCRA/CERCLA Soil and Debris	1000 mg/kg	INCINERATION 99.99% DRE	Nov. 8, 1990

United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

Directive: 9347.3-03FS
July 1989

EPA

Superfund LDR Guide #3

Treatment Standards and Minimum Technology Requirements Under Land Disposal Restrictions (LDRs)

CERCLA section 121(d)(2) requires that Superfund response actions comply with other environmental laws that are applicable or relevant and appropriate requirements (ARARs). A potential ARAR for CERCLA responses is the Resource Conservation and Recovery Act (RCRA) land disposal restrictions (LDRs) established under the Hazardous and Solid Waste Amendments (HSWA). The LDRs prohibit the land disposal of restricted RCRA hazardous wastes unless these wastes meet treatment standards specified in 40 CFR Part 268, meet the minimum technology requirements during a national treatment capacity extension, or satisfy the requirements of one of the other available compliance options (i.e., Treatability Variance, Equivalent Treatment Method Petition, No Migration Petition, or Delisting). **This guide summarizes the types and effective dates of treatment standards and outlines how to comply with the treatment standards and the minimum technology requirements set during national capacity extensions.** More detailed guidance on Superfund compliance with the LDRs is being prepared by the Office of Solid Waste and Emergency Response (OSWER).

TYPES OF TREATMENT STANDARDS

EPA has established treatment standards under the LDRs on the basis of the best demonstrated available technology (BDAT) rather than risk-based or health-based standards. "Best" is defined as that technology which offers the greatest reduction (based on a statistical analysis) of toxicity, mobility, or volume of the waste. To be "demonstrated," a treatment technology must be demonstrated to work at a full-scale level (i.e., technologies available only on a pilot- or bench-scale are not considered demonstrated). To be "available," a treatment technology must be commercially available.

Within this framework, the Agency has established three types of LDR treatment standards:

- Concentration levels -- which must be attained before the wastes or treatment residuals may be land disposed;
- Specified technologies -- which must be applied to the waste before the residuals may be land disposed; and
- No land disposal -- which prohibits land disposal of certain restricted hazardous wastes.

Concentration Levels

The majority of the LDR treatment standards promulgated to date are concentration levels. For wastes with treatment standards expressed as concentrations, any technology that can achieve the required levels may be used unless the technology is otherwise prohibited (i.e., the BDAT used by EPA to set the standards need not be used).

To establish a concentration level(s) for a specific waste code (e.g., K062), the Agency selects a subset of the hazardous constituents found in the waste (known as "BDAT constituents") and sets treatment standards for each of these constituents. Although these wastes may contain additional constituents, only the treatment standards for the "BDAT constituents" must be met before the wastes can be land disposed. The residues from treatment of an originally listed waste (e.g., ash, scrubber water) are also listed RCRA hazardous wastes (because of the "derived from" rule), and therefore, also are prohibited from land disposal unless they meet treatment standards for the waste code(s) of the original listed waste(s) from which they derive.

EPA has promulgated separate standards for wastewaters and nonwastewaters for treatment standards expressed as concentration levels. For LDRs, wastewaters normally are defined as wastes containing less than one percent total organic carbon (TOC) and less than one percent total suspended solids. All other materials (including soil and debris) are classified as nonwastewaters, except for F001-F005 wastes, for which only the TOC is used to define wastewaters.

Concentrations of BDAT constituents in solid residues from treatment must not exceed the nonwastewater concentrations. Similarly, the concentration of BDAT constituents in wastewaters from treatment (e.g., incineration scrubber water) must not exceed the wastewater concentrations. **Highlight 1** provides an example of standards expressed as concentration levels for K062 waste.

Highlight 1 - TREATMENT STANDARDS FOR K062 WASTE*

Constituent	Treatment Standard Total Waste (mg/kg)	 TCLP (mg/l)
Nonwastewater		
Total chromium	NA	0.094
Lead	NA	0.37
Wastewater		
Total chromium	0.32	NA
Nickel	0.44	NA
Lead	0.04	NA

* K062 waste is spent pickle liquor generated by the steel finishing operations of facilities within the iron and steel industry.

Specified Technologies

If a treatment standard is promulgated as a specified technology, that technology must be used to treat the waste unless an Equivalent Treatment Method Petition is approved by the Administrator. To be granted, such a petition must demonstrate that the alternative technology achieves an equivalent measure of performance. For example, the Agency has set the treatment standard for California list PCB wastes containing greater than 500 ppm PCBs as thermal destruction. These wastes must be incinerated to 99.9999 percent destruction and removal efficiency (DRE) under the LDRs before the ash from treatment may be land disposed unless a Petition allowing an equivalent treatment method is granted.

No Land Disposal

EPA sets a standard of no land disposal when, after examining available data, the Agency has determined that: the waste can be totally recycled (e.g., on-site, closed loop recycling); the waste is not currently being land disposed; the waste is no longer generated; or no residuals are anticipated from the use of the BDAT.

Although certain wastes may no longer be generated or land disposed, these wastes may still be found at Superfund sites. EPA has amended most of these waste codes, however, to apply only to wastes generated from the process described in the listing description and disposed of after the effective date of the prohibition (see 54 FR 18836, May 2, 1989). Therefore, CERCLA wastes ordinarily would not be subject to these standards.

COMPLYING WITH LDR TREATMENT STANDARDS

There are two types of tests for evaluating compliance that may be required, depending on how the treatment standards are promulgated: the **Total Waste Analysis (TWA)** measures the total concentration levels of the hazardous constituents in the waste or treatment residuals; and the **Toxicity Characteristic Leaching Procedure (TCLP)** measures concentration levels in the waste extract as a result of the TCLP test.

The TWA test generally is used for organic constituents when a removal or destruction technology is the BDAT. The TCLP generally is used for inorganics when an immobilization BDAT is the basis for the standard. However, the TCLP is also used for the solvent- and dioxin-containing waste LDR treatment standards and TWA is used for metals when BDAT is based on metals recovery. Site managers (OSCs and RPMs for on-site treatment and disposal actions) or treatment facilities (for off-site disposal actions) must test wastes after treatment and before land disposal to determine if the LDR treatment standards are met.

TREATMENT STANDARDS IN EFFECT FOR RCRA HAZARDOUS WASTES

Once a determination that the LDRs are ARARs has been made (see Superfund LDR guide #5), site managers must determine which of the specific LDR restrictions are in effect for their waste(s) of concern. If the Agency has promulgated a treatment standard for a restricted RCRA hazardous waste, either the LDR treatment standards or the minimum technology requirements will be in effect. If EPA has not set a treatment standard for a restricted RCRA hazardous waste, either the soft or hard hammer provisions will be in effect. (See Superfund LDR Guide #4.) The Agency has promulgated treatment standards for the following wastes:

Solvent-Containing RCRA Hazardous Wastes

For solvent-containing RCRA hazardous wastes (F001-F005), EPA has promulgated treatment standards expressed as concentration levels. Unlike most of the treatment standards for wastes containing organic constituents, the standards for the F001-F005 wastes are expressed as TCLP concentrations (40 CFR 268.41).

Dioxin-Containing RCRA Hazardous Wastes

Dioxin-containing wastes (F020-F023 and F026-F028), include chlorinated dibenzo-p-dioxins (CDDs), chlorinated dibenzofurans (CDFs), and chlorophenols. The treatment standards expressed as concentration levels are based on incineration of contaminated soil. Because current analytical methods cannot measure the concentration levels attainable by the BDAT, EPA set the treatment standards at the practical detection limits (i.e., 1 ppb) for most wastes. These standards are also based on a TCLP analysis (40 CFR 268.41).

Although the LDR treatment standards for dioxin-containing wastes are concentration levels, the dioxin-listing rule (50 FR 1978) requires special management standards for certain types of units:

- Incineration in accordance with 40 CFR 264.343 and 40 CFR 265.352;
- Thermal treatment to 99.9999 percent DRE in accordance with 40 CFR 265.383; or
- Tank treatment, in accordance with 40 CFR 264.200.

Highlight 2 describes the LDR restrictions in effect for solvent- and dioxin-containing RCRA hazardous wastes.

California List Hazardous Wastes

The California list rule established specified technologies as the treatment standards for certain California list wastes. Specifically, California list PCB and halogenated organic compound (HOC) wastes (except dilute HOC wastewaters) must be incinerated or burned in high-efficiency boilers or industrial furnaces. **Highlight 3** provides the LDR restrictions in effect for California list wastes.

First Third Wastes

The First Third sched.:led wastes include those listed wastes that are intrinsically hazardous or are high-volume wastes. EPA promulgated treatmen standards expressed as concentration levels and no lan disposal based on TWA and TCLP for certain Firs Third wastes on August 17, 1988. First Third waste that do not have promulgated treatment standards ar restricted under the "soft hammer" provision **Highlight 4** describes the LDR restrictions in effect f certain First Third wastes for which the Agency has s treatment standards.

MINIMUM TECHNOLOGY REQUIREMENT THAT APPLY DURING A NATIONAL CAPACIT EXTENSION

If during the promulgation of treatment standard the Agency determines that insufficient treatme capacity exists, the Agency may grant a nation capacity extension for a period of up to two year During the extension period, if wastes are to be lan disposed in surface impoundments or landfills, the unit must comply with the RCRA Subtitle C minimu technology requirements (i.e., double liner, leacha collection system, and ground-water monitoring) unde RCRA 3005(j)(2) or (j)(4) or the receiving units mu have a retrofitting waiver under RCRA 3004(o)(2) 3005(j) to be considered equivalent to the minimum technology requirements.

Highlight 2 - EFFECTIVE DATES AND LDR RESTRICTIONS FOR SOLVENTS AND DIOXINS

TYPE OF RESTRICTED RCRA HAZARDOUS WASTE	TREATMENT STANDARD EFFECTIVE DATE	LDR RESTRICTION IN EFFECT AS OF NOVEMBER 8, 1988
F001 to F005 (spent solvent-containing wastes)	November 8, 1986 or November 8, 1988*	Treatment standards as concentration levels (TCLP)
F020 to F023, F026 to F028 (dioxin-containing wastes)	November 8, 1988	Treatment standards as concentration levels (TCLP)
Soil and debris contaminated with solvent/dioxin NOT from CERCLA/RCRA corrective actions	November 8, 1988	Treatment standards as concentration levels (TCLP)
Soil and debris contaminated with solvent/dioxin from CERCLA/RCRA corrective actions	November 8, 1990	Minimum technology requirements if disposed of in landfill or surface impoundment

* Soil and debris contaminated with solvent-containing wastes were granted a statutory two-year extension to November 8, 1988. All other solvent-containing wastes became restricted on November 8, 1986.

Highlight 3 - EFFECTIVE DATES AND LDR RESTRICTIONS FOR CALIFORNIA LIST WASTES[a]

TYPE OF RESTRICTED RCRA HAZARDOUS WASTE	TREATMENT STANDARD EFFECTIVE DATE	LDR RESTRICTION IN EFFECT AS OF NOVEMBER 8, 1988
California list PCBs	July 8, 1987	Treatment standards as specified technology(ies)
Liquid and non-liquid HOCs	November 8, 1988	Treatment standards as specified technology(ies)
Soil and debris contaminated with HOCs NOT from CERCLA/RCRA corrective actions	July 8, 1989	Minimum technology requirements if disposed of in landfill or surface impoundment
Soil and debris contaminated with HOCs from CERCLA/RCRA corrective actions	November 8, 1990	Minimum technology requirements if disposed of in landfill or surface impoundment

---

[a] See Superfund LDR Guide #4 for soft and hard hammer restrictions in effect for remaining California list wastes.

National capacity extensions for several types of wastes currently are in effect under the LDRs. For example, soil and debris from CERCLA and RCRA corrective actions that are contaminated with solvent, dioxin, and California list wastes have received an extension until November 8, 1990. All soil and debris contaminated with First Third wastes for which the BDAT is based on solids incineration have received an extension until August 8, 1990. Land disposal of wastes subject to national capacity extensions in units other than surface impoundments and landfills (e.g., waste piles, land treatment units) is not subject to the minimum technology requirements during such an extension.

Highlight 4 - EFFECTIVE DATES AND LDR RESTRICTIONS FOR CERTAIN FIRST THIRD WASTES[a]

TYPE OF RESTRICTED RCRA HAZARDOUS WASTE	TREATMENT STANDARD EFFECTIVE DATE	LDR RESTRICTION IN EFFECT AS OF NOVEMBER 8, 1988
First Third wastes (not otherwise accounted for)[b]	August 8, 1988	Treatment standards as concentration levels (TWA and TCLP) and (for a few waste codes) "no land disposal"
Soil and debris contaminated with First Third wastes for which BDAT is other than solids incineration	August 8, 1988	Treatment standards as concentration levels (TWA and TCLP) and "no land disposal"
Soil and debris contaminated with First Third wastes for which BDAT is solids incineration	August 8, 1990	Minimum technology requirements if disposed of in landfill or surface impoundment

---

[a] See Superfund LDR Guide #4 for soft and hard hammer restrictions in effect for First Third wastes.

[b] Except K048-K052 and K071, which were granted a two-year extension until August 8, 1990.

EPA

United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

Directive: 9347.3-04FS
July 1989

Superfund LDR Guide #4

Complying With the Hammer Restrictions Under Land Disposal Restrictions (LDRs)

CERCLA response actions must comply with the Resource Conservation and Recovery Act (RCRA) Land Disposal Restrictions (LDRs) when they are determined to be applicable or relevant and appropriate requirements (ARARs). Compliance with the LDRs will involve meeting the LDR treatment standards, minimum technology requirements during a national capacity extension, the soft or hard hammer restrictions, or satisfying the requirements of one of the other LDR compliance options (i.e., Treatability Variance, Equivalent Treatment Method Petition, No Migration Petition, or Delisting). **This guide discusses complying with LDR soft hammer and hard hammer provisions, which are restrictions on the disposal of hazardous wastes if EPA does not promulgate standards by the statutory deadlines.** More detailed guidance on Superfund compliance with the LDRs is being prepared by the Office of Solid Waste and Emergency Response (OSWER).

SOFT HAMMER WASTES

If the Agency fails to set treatment standards for First or Second Third wastes by their specified statutory deadline (August 8, 1988, and June 8, 1989, respectively), the wastes become restricted under the soft hammer provisions until EPA sets a treatment standard for them, or until May 8, 1990, when the "hard hammer" provisions will fall. The soft hammer provisions specify certain restrictions that may have to be met before the wastes can be land disposed. The hard hammer provisions prohibit all land disposal of the wastes. **Highlight 1** lists wastes that are soft hammer wastes (as of August 8, 1988).

Soft Hammer Restrictions

The LDR soft hammer provisions prohibit the disposal of wastes in **surface impoundment** or **landfill units** unless:

(1) The receiving unit meets the RCRA minimum technology requirements (i.e., the unit must have two or more liners, a leachate collection system, and a ground-water monitoring system) or have an equivalent RCRA retrofitting waiver. These waivers are described in RCRA §3005(j)(2), which requires that a unit be at least one-quarter of a mile from an underground drinking source, and

Highlight 1 - F and K SOFT HAMMER WASTES (as of June 8, 1989)*

Waste Code	Physical Form	Waste Code	Physical Form
F006	wastewaters	K046	wastewaters and nonwastewaters
F019	wastewaters and nonwastewaters	K060	wastewaters
K004	wastewaters and nonwastewaters	K061	wastewaters
K008	wastewaters and nonwastewaters	K069	wastewaters and nonwastewaters
K011	wastewaters	K073	wastewaters and nonwastewaters
K013	wastewaters	K083	wastewaters and nonwastewaters
K014	wastewaters	K084	wastewaters and nonwastewaters
K017	wastewaters and nonwastewaters	K085	wastewaters and nonwastewaters
K021	wastewaters	K086	wastewaters
K022	wastewaters	K095	wastewaters
K025	wastewaters	K096	wastewaters
K029	wastewaters	K097	wastewaters and nonwastewaters
K031	wastewaters and nonwastewaters	K098	wastewaters and nonwastewaters
K035	wastewaters and nonwastewaters	K101	nonwastewaters
K036	wastewaters	K102	nonwastewaters
K041	wastewaters and nonwastewaters	K105	wastewaters and nonwastewaters
K042	wastewaters and nonwastewaters	K106	wastewaters and nonwastewaters

* For a complete listing of soft hammer waste restrictions, including all P and U wastes that are restricted, consult with EPA Headquarters

RCRA §3005(j)(4), which requires that the unit be designed and operated such that there will be no migration of hazardous constituents into ground or surface water.

Waivers granted to units utilizing aggressive biological treatment (RCRA §3005(j)(3)) or undergoing corrective action (RCRA §3005(j)(13)) are not automatically considered equivalent to units in compliance with the minimum technology requirements. However, they may satisfy the §3004(o)(2) equivalency standard on a unit-by-unit basis.

(2) Site managers certify that they have made a good faith effort to locate and to contract with treatment and recovery facilities for treatment that is "practically available." If such treatment is "practically available," the manager must use the best, practically available treatment (see **Highlight** 2) to treat the wastes before they are land disposed. If there is no "practically available" treatment, the soft hammer wastes may be disposed of without treatment in units meeting the requirements listed in (1).

Highlight 2 - GUIDANCE TO "PRACTICALLY AVAILABLE" AND "BEST" TREATMENT

- Practically Available - Site managers may consider cost in determining what treatments are "practically available" according to the following cost ratio:

  Cost of treatment, shipment, and disposal
  Cost of shipment and disposal

  - A ratio of 2.0 or greater (i.e., the cost of treatment at least doubles the cost of disposing of the waste without treatment) generally is not "practical";
  - A ratio between 1.5 and 2.0 generally is practical unless, on a case-by-case basis, the site manager can demonstrate why this treatment should not be considered practical; and
  - A ratio of 1.5 or less generally is practical.

This cost ratio is only a guideline for making decisions about practically available treatments; it is not a rule.

- Best Treatment - Of the treatment technologies that are "practically available," site managers are required to use the technology that yields the greatest environmental benefit. In general, EPA favors recycling/recovery as the best method for treating a waste. The next best general category of treatment is destruction (thermal or chemical), especially for organic wastes. Where neither recovery nor destruction is available or appropriate, immobilization of the wastes may be considered "best," especially for inorganic wastes.

Soft hammer wastes disposed of in units other than surface impoundments or landfills do not have to meet the soft hammer restrictions before land disposal. However, these wastes must comply with the LDR notification requirements and other LDR restrictions, such as storage prohibition. (The storage prohibition restricts the storage of soft hammer wastes unless it is solely for the purpose of accumulating sufficient quantities to facilitate proper treatment, recovery, or disposal.)

Soft Hammer Requirements for Notifications, Certifications, and Demonstrations

When soft hammer wastes are land disposed or treated off-site, site managers must comply with the LDR notification, certification, and demonstration requirements. When treatment and land disposal occur on-site, site managers must only meet the demonstration requirements. (The notification and certification requirements are administrative requirements and do not have to be met for on-site actions.) The specific notification requirements, including to whom and when they must be sent and the required language from 40 CFR Part 268, are shown in **Highlight** 3 for each of these categories.

California List and Soft Hammer Overlap

Certain soft hammer wastes also may be California list wastes, in which case they may be subject either to the California list or soft hammer requirements. If a waste is restricted by soft hammer and California list restrictions, site managers should meet the more stringent standard for the waste.

- If treatment standards have been promulgated for a California list waste that is also a soft hammer, the California list treatment standard must be met for the waste before it is land disposed of into any type of unit. In this case, the soft hammer restrictions and notification, certification, and demonstration requirements do not apply.

- If treatment standards have not been promulgated for a California list waste that is also a soft hammer, and the waste is to be land disposed in a surface impoundment or landfill, one of two situations may arise:

  (1) If treatment is "practically available," a site manager must use the "best" treatment to meet the soft hammer requirements.

  (2) If treatment is not "practically available," the waste still must, at a minimum, be treated to below the California list prohibition levels before being land disposed to satisfy the California list restrictions.

Highlight 3 - SOFT HAMMER NOTIFICATION, CERTIFICATION, AND DEMONSTRATION REQUIREMENTS

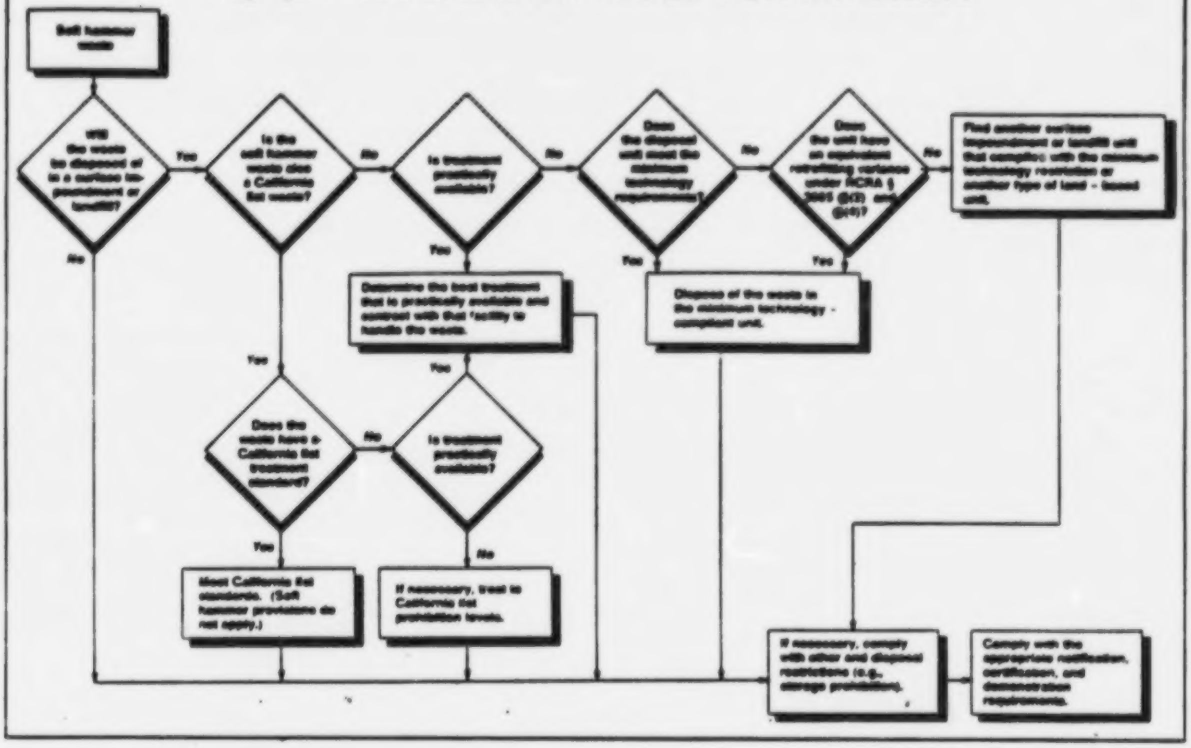
REQUIREMENT	SENT TO	WHEN	REQUIRED INFORMATION
IF LAND DISPOSAL OCCURS IN SURFACE IMPOUNDMENT OR LANDFILL UNITS			
NOTIFICATION (off-site only)	Treatment or disposal facility receiving waste	With each waste shipment	Notification that the waste is a soft hammer waste. Specific information includes: - EPA hazardous waste number; - Any applicable prohibitions (e.g., soft hammer provision); - Manifest number associated with shipment of waste; and - Waste analysis data, where available.
CERTIFICATION - If treatment is not practically available (off-site only)	EPA Regional Administrator and Disposal facility receiving waste	At time of first waste shipment and copy with each waste shipment	Certification should appear as follows: "EPA certifies under penalty of law that the requirements of 40 CFR 268.8(a)(1) have been met and that disposal in a landfill or surface impoundment is the only practical alternative to treatment currently available. EPA believes that the information submitted is true, accurate, and complete. EPA is aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."
CERTIFICATION - If treatment is practically available (off-site only)	EPA Regional Administrator and Treatment facility receiving waste	At time of first waste shipment and copy with each waste shipment	Certification should appear as follows: "EPA certifies under penalty of law that the requirements of 40 CFR 268.8(a)(1) have been met and that the agency has contracted to treat its waste (or will otherwise provide treatment) by the practically available technology which yields the greatest environmental benefit, as indicated in its demonstration. EPA believes that the information submitted is true, accurate, and complete. EPA is aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."
DEMONSTRATION - If no treatment is available (off-site and on-site)	EPA Regional Administrator	At time of first waste shipment	List of facilities and facility officials contacted, addresses, telephone numbers, and contact dates. Also, a written discussion of when treatment or recovery is not practical for the waste.
DEMONSTRATION - If treatment is available (off-site and on-site)	EPA Regional Administrator	At time of first waste shipment	List of facilities and facility officials contacted, addresses, telephone numbers, and contact dates. Provide information on the chosen treatment technology selected because it provides the greatest environmental benefit.

In both cases, site managers must meet the appropriate soft hammer notification, certification, and demonstration requirements.

If the waste will be land disposed in a unit other than a surface impoundment or landfill (e.g., waste pile), the waste must, at a minimum, be treated below the California list prohibition level before being land disposed. The soft hammer restrictions do not apply, and a site manager does not have to meet the soft hammer notification, certification, and demonstration requirements.

More information on California list wastes and their overlap with soft hammer wastes is found in LDR Guide #2. A step-by-step process to comply with the soft hammer restrictions is shown in **Highlight 4**.

Highlight 4 - IDENTIFYING SOFT HAMMER WASTE RESTRICTIONS


Soft hammer waste
Will the waste be disposed of in a surface impoundment or landfill?
Yes
No
Is the soft hammer waste also a California list waste?
No
Yes
Is treatment practically available?
No
Yes
Does the disposal unit meet the minimum technology requirements?
No
Yes
Does the unit have an exemption retrofitting variance under RCRA § 3005 (j)(2) and (j)(4)?
No
Yes
Find another surface impoundment or landfill unit that complies with the minimum technology restriction or another type of land - based unit.
Determine the best treatment that is practically available and contract with that facility to handle the waste.
Dispose of the waste in the minimum technology - compliant unit.
Does the waste have a California list treatment standard?
No
Is treatment practically available?
Yes
Yes
No
Meet California list standards. (Soft hammer provisions do not apply.)
If necessary, treat to California list prohibition levels.
If necessary, comply with other land disposal restrictions (e.g., storage prohibition).
Comply with the appropriate notification, certification, and demonstration requirements.

HARD HAMMER WASTES

The hard hammer provisions prohibit land disposal of restricted wastes if EPA fails to promulgate treatment standards by the statutory deadlines for solvent- and dioxin-containing and California list wastes and by May 8, 1990, for all of the scheduled wastes. The deadlines for these wastes are shown in **Highlight 5**. At present, the hard hammer provisions have only fallen for California list cyanides and metals. EPA has also codified statutory prohibition levels for California list corrosive wastes and dilute HOC wastewaters. Codification of the prohibition levels has the same effect as letting the hard hammer fall: land disposal of these wastes is prohibited when wastes are found in concentrations above the prohibition levels.

There are only two exceptions to the prohibition on land disposal of the hard hammer wastes: delisting and a No-Migration Petition. Delisting is a general option for demonstrating that a listed waste is no longer hazardous that is available under RCRA §260.20 and §260.22. The process to obtain No-Migration Petitions is specified in RCRA §268.6. To obtain a Petition, disposal facilities demonstrate that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the waste remains hazardous. This is a rulemaking petition and is expected to require extensive documentation.

Highlight 5: HARD HAMMER DEADLINES

Waste	Hard Hammer Statutory Deadline
Solvent & dioxin wastes	November 8, 1986
California list wastes	July 8, 1987
CERCLA/RCRA corrective action soil and debris contaminated with solvent and dioxin and California list wastes	November 8, 1988
Scheduled wastes (1st Third, 2nd Third, and 3rd Third wastes)	May 8, 1990

United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

Directive: 9347.3-05FS
July 1989

EPA

Superfund LDR Guide #5

Determining When Land Disposal Restrictions (LDRs) Are Applicable to CERCLA Response Actions

CERCLA Section 121(d)(2) specifies that on-site Superfund remedial actions shall attain "other Federal standards, requirements, criteria, limitations, or more stringent State requirements that are determined to be legally applicable or relevant and appropriate (ARAR) to the specified circumstances at the site." In addition, the National Contingency Plan (NCP) requires that on-site removal actions attain ARARs to the extent practicable. Off-site removal and remedial actions must comply with legally applicable requirements. **This guide outlines the process used to determine whether the Resource Conservation and Recovery Act (RCRA) land disposal restrictions (LDRs) established under the Hazardous and Solid Waste Amendments (HSWA) are "applicable" to a CERCLA response action.** More detailed guidance on Superfund compliance with the LDRs is being prepared by the Office of Solid Waste and Emergency Response (OSWER).

For the LDRs to be applicable to a CERCLA response, the action must constitute placement of a restricted RCRA hazardous waste. Therefore, site managers (OSCs, RPMs) must answer three separate questions to determine if the LDRs are applicable:

(1) Does the response action constitute placement?

(2) Is the CERCLA substance being placed also a RCRA hazardous waste? and if so

(3) Is the RCRA waste restricted under the LDRs?

Site managers also must determine if the CERCLA substances are California list wastes, which are a distinct category of RCRA hazardous wastes restricted under the LDRs (see Superfund LDR Guide #2).

(1) DOES THE RESPONSE CONSTITUTE PLACEMENT?

The LDRs place specific restrictions (e.g., treatment of waste to concentration levels) on RCRA hazardous wastes prior to their placement in land disposal units. Therefore, a key determination is whether the response action will constitute placement of wastes into a land disposal unit. As defined by RCRA, land disposal units include landfills, surface impoundments, waste piles, injection wells, land treatment facilities, salt dome formations, underground mines or caves, and concrete bunkers or vaults. If a CERCLA response includes disposal of wastes in any of these types of off-site land disposal units, placement will occur. However, uncontrolled hazardous waste sites often have widespread and dispersed contamination, making the concept of a RCRA unit less useful for actions involving on-site disposal of wastes. Therefore, to assist in defining when "placement" does and does not occur for CERCLA actions involving on-site disposal of wastes, EPA uses the concept of "areas of contamination" (AOCs), which may be viewed as equivalent to RCRA units, for the purposes of LDR applicability determinations.

An AOC is delineated by the areal extent (or boundary) of contiguous contamination. Such contamination must be continuous, but may contain varying types and concentrations of hazardous substances. Depending on site characteristics, one or more AOCs may be delineated. **Highlight 1** provides some examples of AOCs.

Highlight 1: EXAMPLES OF AREAS OF CONTAMINATION (AOCs)

- **A waste source (e.g., waste pit, landfill, waste pile) and the surrounding contaminated soil.**
- **A waste source, and the sediments in a stream contaminated by the source, where the contamination is continuous from the source to the sediments.***
- **Several lagoons separated only by dikes, where the dikes are contaminated and the lagoons share a common liner.**

---

* The AOC does not include any contaminated surface or ground water that may be associated with the land-based waste source.

For on-site disposal, placement occurs when wastes are moved from one AOC (or unit) into another AOC (or unit). Placement does not occur when wastes are left in place, or moved within a single AOC. **Highlight 2** provides scenarios of when placement does and does not occur, as defined in the proposed NCP. The Agency is current reevaluating the definition of placement prior to the promulgation of the final NCP, and therefore, these scenarios are subject to change.

Highlight 2: PLACEMENT

Placement does occur when wastes are:

- Consolidated from different AOCs into a single AOC;
- Moved outside of an AOC (for treatment or storage, for example) and returned to the same or a different AOC; or
- Excavated from an AOC, placed in a separate unit, such as an incinerator or tank that is within the AOC, and redeposited into the same AOC.

Placement does not occur when wastes are:

- Treated in situ;
- Capped in place;
- Consolidated within the AOC; or
- Processed within the AOC (but not in a separate unit, such as a tank) to improve its structural stability (e.g., for capping or to support heavy machinery).

In summary, if placement on-site or off-site does not occur, the LDRs are not applicable to the Superfund action.

(2) IS THE CERCLA SUBSTANCE A RCRA HAZARDOUS WASTE?

Because a CERCLA response must constitute placement of a restricted RCRA hazardous waste for the LDRs to be applicable, site managers must evaluate whether the contaminants at the CERCLA site are RCRA hazardous wastes. **Highlight 3** briefly describes the two types of RCRA hazardous wastes --listed and characteristic wastes.

Highlight 3: RCRA HAZARDOUS WASTES

A RCRA solid waste* is hazardous if it is listed or exhibits a hazardous characteristic.

Listed RCRA Hazardous Wastes

Any waste listed in Subpart D of 40 CFR 261, including:

- F waste codes (Part 261.31)
- K waste codes (Part 261.32)
- P waste codes (Part 261.33(e))
- U waste codes (Part 261.33(f))

Characteristic RCRA Hazardous Wastes

Any waste exhibiting one of the following characteristics, as defined in 40 CFR 261:

- Ignitability
- Corrosivity
- Reactivity
- Extraction Procedure (EP) Toxicity

---

* A solid waste is any material that is discarded or disposed of (i.e., abandoned, recycled in certain ways, or considered inherently waste-like). The waste may be solid, semi-solid, liquid, or a contained gaseous material. Exclusions from the definition (e.g., domestic sewage sludge) appear in 40 CFR 261.4(a). Exemptions (e.g., household wastes) are found in 40 CFR 261.4(b).

Site managers are not required to presume that a CERCLA hazardous substance is a RCRA hazardous waste unless there is affirmative evidence to support such a finding. Site managers, therefore, should use "reasonable efforts" to determine whether a substance is a RCRA listed or characteristic waste. (Current data collection efforts during CERCLA removal and remedial site investigations should be sufficient for this purpose.) For listed hazardous wastes, if manifests or labels are not available, this evaluation likely will require fairly specific information about the waste (e.g., source, prior use, process type) that is "reasonably ascertainable" within the scope of a Superfund investigation. Such information may be obtained from facility business records or from an examination of the processes used at the facility. For characteristic wastes, site managers may rely on the results of the tests described in 40 CFR 261.21 - 261.24 for each characteristic or on knowledge of the properties of the substance. Site managers should work with Regional RCRA staff, Regional Counsel, State RCRA staff, and Superfund enforcement personnel, as appropriate, in making these determinations.

In addition to understanding the two categories of RCRA hazardous wastes, site managers will also need to understand the derived-from rule, the mixture rule, and the contained-in intèrpretation to correctly identify whether a CERCLA substance is a RCRA hazardous waste. These three principles, as well as an introduction to the RCRA delisting process, are described below.

Derived-from Rule (40 CFR 261.3(c)(2))

The derived-from rule states that any solid waste derived from the treatment, storage, or disposal of a listed RCRA hazardous waste is itself a listed hazardous waste (regardless of the concentration of hazardous constituents). For example, ash and scrubber water from the incineration of a listed waste are hazardous wastes on the basis of the derived-from rule. Solid wastes derived from a characteristic hazardous waste are hazardous wastes only if they exhibit a characteristic.

Mixture Rule (40 CFR 261.3(a)(2))

Under the mixture rule, when any solid waste and a listed hazardous waste are mixed, the entire mixture is a listed hazardous waste. For example, if a generator mixes a drum of listed F006 electroplating waste with a non-hazardous wastewater (wastewaters are solid wastes - see **Highlight** 3), the entire mixture of the F006 and wastewater is a listed hazardous waste. Mixtures of solid wastes and characteristic hazardous wastes are hazardous only if the mixture exhibits a characteristic.

Contained-in Interpretation (OSW Memorandum dated November 13, 1986)

The contained-in interpretation states that any mixture of a non-solid waste and a RCRA listed hazardous waste must be managed as a hazardous waste as long as the material contains (i.e., is above health-based levels) the listed hazardous waste. For example, if soil or ground water (i.e., both non-solid wastes) contain an F001 spent solvent, that soil or ground water must be managed as a RCRA hazardous waste, as long as it "contains" the F001 spent solvent.

Delisting (40 CFR 260.20 and .22)

To be exempted from the RCRA hazardous waste "system," a listed hazardous waste, a mixture of a listed and solid waste, or a derived-from waste must be delisted (according to 40 CFR 260.20 and .22). Characteristic hazardous wastes never need to be delisted, but can be treated to no longer exhibit the characteristic. A contained-in waste does not have to be delisted; it only has to "no longer contain" the hazardous waste.

If site managers determine that the hazardous substance(s) at the site is a RCRA hazardous waste(s), they should also determine whether that RCRA waste is a California list waste. California list wastes are a distinct category of RCRA wastes restricted under the LDRs. (See Superfund LDR Guide #2.)

(3) IS THE RCRA WASTE RESTRICTED UNDER THE LDRs?

If a site manager determines that a CERCLA waste is a RCRA hazardous waste, this waste also must be restricted for the LDRs to be an applicable requirement. A RCRA hazardous waste becomes a restricted waste on its HSWA statutory deadline or sooner if the Agency promulgates a standard before the deadline. Because the LDRs are being phased in over a period of time (see **Highlight** 4), site managers may need to determine what type of restriction is in

Highlight 4: LDR STATUTORY DEADLINES

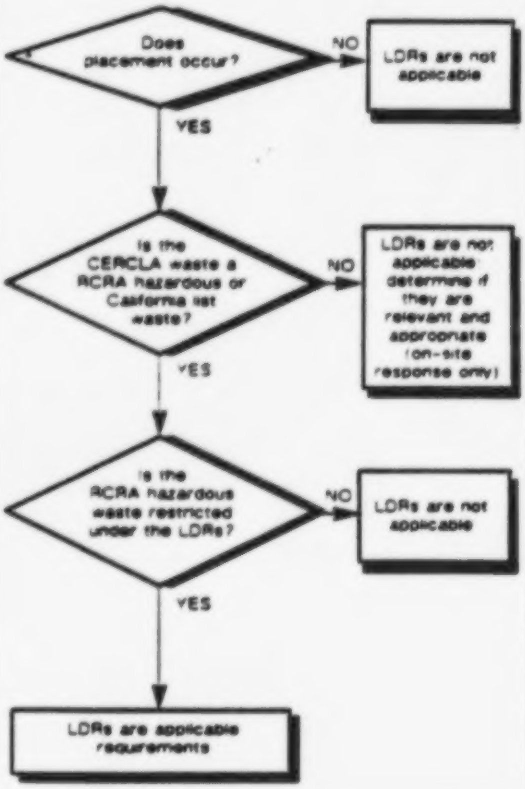
Waste	Statutory Deadline
Spent Solvent and Dioxin-Containing Wastes	November 8, 1986
California List Wastes	July 8, 1987
First Third Wastes	August 8, 1988
Spent Solvent, Dioxin-Containing, and California List Soil and Debris From CERCLA/RCRA Corrective Actions	November 8, 1988
Second Third Wastes	June 8, 1989
Third Third Wastes	May 8, 1990
Newly Identified Wastes	Within 6 months of identification as a hazardous waste

effect at the time placement is to occur. For example, if the RCRA hazardous wastes at a site are currently under a national capacity extension when the CERCLA decision document is signed, site managers should evaluate whether the response action will be completed before the extension expires. If these wastes are disposed of in surface impoundments or landfills prior to the expiration of the extension, the receiving unit would have to meet minimum technology requirements, but the wastes would not have to be treated to meet the LDR treatment standards.

APPLICABILITY DETERMINATIONS

If the site manager determines that the LDRs are applicable to the CERCLA response based on the previous three questions, the site manager must: (1) comply with the LDR restriction in effect, (2) comply with the LDRs by choosing one of the LDR compliance options (e.g., Treatability Variance, No Migration Petition), or (3) invoke an ARAR waiver (available only for on-site actions). If the LDRs are determined not to be applicable, then, for on-site actions only, the site manager should determine if the LDRs are relevant and appropriate. The process for determining whether the LDRs are applicable to a CERCLA action is summarized in **Highlight 5**.

Highlight 5 - DETERMINING WHEN LDRS ARE APPLICABLE REQUIREMENTS


Does placement occur?
NO
LDRs are not applicable
YES
Is the CERCLA waste a RCRA hazardous or California list waste?
NO
LDRs are not applicable; determine if they are relevant and appropriate (on-site response only)
YES
Is the RCRA hazardous waste restricted under the LDRs?
NO
LDRs are not applicable
YES
LDRs are applicable requirements

United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

Directive: 9347.3-06FS
July 1989

EPA

Superfund LDR Guide #6A

Obtaining a Soil and Debris Treatability Variance for Remedial Actions

CERCLA response actions must comply with the RCRA Land Disposal Restrictions (LDRs) when they are determined t be applicable or relevant and appropriate requirements (ARARs). (The Agency has decided, however, that the LDRs are n relevant and appropriate for soil and debris wastes at this time.) For the LDRs to be applicable, the CERCLA response actio must constitute placement of a restricted RCRA hazardous waste (see LDR Guide #5). Compliance with the LDRs will involv either meeting the LDR treatment standards, other LDR restrictions (e.g., soft hammers), or satisfying the requirements of on of the other alternate LDR compliance options (e.g., Treatability Variance, Equivalent Treatment Method Petition). **This guid outlines the process for obtaining and complying with a Treatability Variance for soil and debris that are contaminated wit RCRA hazardous wastes for which the Agency has set treatment standards.** More detailed guidance on Superfund complianc with the LDRs is being prepared by the Office of Solid Waste and Emergency Response (OSWER).

BASIS FOR A TREATABILITY VARIANCE

When promulgating the LDR treatment standards, the Agency recognized that treatment of wastes to the LDR treatment standards would not always be possible or appropriate. In addition, the Agency recognized the importance of ensuring that the LDRs do not unnecessarily restrict the development and use of alternative and innovative treatment technologies for remediating hazardous waste sites. Therefore, a Treatability Variance process (40 CFR §268.44) is available to comply with the LDRs when a Superfund waste differs significantly from the waste used to set the LDR treatment standard such that:

- The LDR standard cannot be met; or
- The best demonstrated available technology (BDAT) used to set the standard is inappropriate for the waste.

Superfund site managers (OSCs, RPMs) may need to seek a Treatability Variance to comply with the LDRs when managing restricted soil and debris wastes (see **Highlight 1**) because the LDR treatment standards are based on treating less complex matrices of industrial process wastes (except for the dioxin standards, which are based on treating contaminated soil). A Treatability Variance does not remove the requirement to treat restricted soil and debris wastes. Rather, under a Treatability Variance, alternate treatment levels are established based on data from actual treatment of soil, or best management practices for debris.

Although the specific justification required to obtain a Treatability Variance may differ from site-to-site, site managers generally will make this justification on the basis of: (1) Available information on the performance capabilities of the technology(ies) being considered, (2) Site-specific conditions that may affect the implementation or effectiveness of those technologies, and (3) The remediation goals of the CERCLA response action.

At many sites, data from treatability studies conducte during the RI/FS will suffice as justification for obtainin a Treatability Variance. For example, if data fror treatability studies indicate that the full-scale operation c a specific treatment technology cannot consistently meet th LDR treatment standards for all soil and debris (includin the most contaminated waste areas of the site), sit managers may use those data as justification to obtain Treatability Variance for those contaminated soils and debri that cannot be treated to the standard.

When site-specific treatability study data are n available, surrogate data from the application of technologie to wastes of similar types may be used to assess th effectiveness of treating soil and debris and help sit managers determine whether a Treatability Variance warranted. Potential surrogate data sources include: (Treatability data bases, such as the one developed by EPA Risk Reduction Engineering Laboratory; (2) Results fror

Highlight 1: SOIL AND DEBRIS

Soil. Soil is defined as materials that are primarily of geologic origin such as sand, silt, loam, or clay, that are indigenous to the natural geologic environment at or near the CERCLA site. (In many cases, soil is mixed with liquids, sludges, and/or debris.)

Debris. Debris is defined as materials that are primarily non-geologic in origin, such as grass, trees, stumps, and man-made materials such as concrete, clothing, partially buried whole or empty drums, capacitors, and other synthetic manufactured materials, such as liners. (It does not include synthetic organic chemicals, but may include materials contaminated with these chemicals.)

treatability studies and from remedial actions conducted at other sites; and (3) Existing literature that describes the effectiveness/limitations of specific treatment technologies. Unless the surrogate data show that a technology operated at full scale can consistently meet the LDR treatment standards for all soil and debris that it will be called upon to treat, site managers should seek a Treatability Variance.

In some cases (especially when treatability studies are not conducted as part of the RI/FS), data that indicate whether a treatment technology or process can attain the LDR treatment standards may not be available. This situation may arise when an innovative technology is being considered, or when a "demonstrated" technology is being applied to wastes for which performance data do not exist. Under such circumstances, site managers may select a particular technology as the preferred alternative, if there are technically sound reasons to believe that it will perform effectively. The specific selection criteria (e.g., long- and short-term effectiveness, implementability) upon which the rationale would be based should be included when profiling the alternative in the Detailed Analysis chapter of the FS report. When there are no actual performance data available that indicate the LDR treatment standards can be met consistently for all soil and debris, site managers should seek a Treatability Variance. Site specific conditions need to be considered and documented at sites where a Treatability Variance is sought.

HOW TO OBTAIN A TREATABILITY VARIANCE FOR SOIL AND DEBRIS WASTES

Once it is determined that a CERCLA waste is a soil or debris, and that a Treatability Variance will be necessary (i.e., the LDRs are applicable for the response action addressing soil or debris wastes and there is a reasonable doubt that the standards can be met consistently for all the soil and debris wastes requiring treatment), site managers should initiate the process of obtaining a Variance. For remedial actions, the need for a Treatability Variance should be evident during the RI/FS as information on waste types is collected, potential waste management strategies are evaluated, and the determination of whether the LDRs are applicable is made.

Obtaining a Treatability Variance

Obtaining a Treatability Variance for remedial actions will involve: (1) documenting the rationale and justification for the Treatability Variance in the FS Report; (2) announcing the intent to seek a Treatability Variance in the Proposed Plan; and (3) granting of the Treatability Variance by the Regional Administrator or the Assistant Administrator/OSWER when the ROD is signed.

Highlight 2 - INFORMATION TO BE INCLUDED IN THE DOCUMENTATION OF A SOIL AND DEBRIS TREATABILITY VARIANCE IN AN RI/FS REPORT FOR ON-SITE AND OFF-SITE CERCLA RESPONSE ACTIONS

ON-SITE

■Description of the Proposed Action (e.g., "Applying for an LDR Treatability Variance under 40 CFR §268.44);

■A statement of need and justification for the proposed action (e.g., "data do not indicate that full scale treatment can consistently attain the LDR treatment standards for all waste areas, including the most contaminated areas, at the site.")

■A description of the soil or debris waste (e.g., information on the physical and chemical characteristics of the waste, including waste analysis data) and description of the source of the contamination;

■If the soil and debris waste has been treated (e.g., treatability study), or surrogate data are available, a description of the treatment system (e.g., process design, operating conditions) and explanation of why the LDR treatment standard cannot be achieved using the treatment system or why the BDAT technology is inappropriate for the waste;

■If the soil and debris waste has not been treated, an explanation of why the BDAT treatment technology is inappropriate or why treatment of the waste will not be able to achieve the LDR treatment standards;

■A description of the methodologies and equipment used to obtain representative samples, a description of the sample handling and preparation techniques, and a description of the QA/QC measures for waste analysis and treatment.

■A description of any alternative treatment methods examined by the petitioner a description of the treatment method that the petitioner believes is appropriate to treat waste and an identification of the interim "treatment levels" developed by the lead agency for the waste constituents or best management practices; and

■For each alternative for which a Treatability Variance is required, the specific treatment level range to be achieved to comply with the LDRs through a Treatability Variance (see Highlight 3 to determine these treatment levels).

OFF-SITE

For off-site Treatability Variances, the documentation requirements above should be extracted from the RI/FS report and combined with the following information in a separate document:

■Petitioner's name and address and identification of an authorized contact person (if different);

■Statement of petitioner's interest in obtaining a Treatability Variance; and

---

* This document may be prepared after the ROD is signed (and Treatability Variance granted) but will need to be compiled prior to the first shipment of wastes (or treatment residuals) to the receiving treatment or disposal facility.

Reproduced from best available copy.

FS Report

The FS Report should contain the necessary information (see **Highlight 2**) to justify a Treatability Variance using, where appropriate, data and findings from the RI Report. In the Detailed Analysis of Alternatives chapter of the FS Report, a general discussion of why a Treatability Variance is necessary should be included in the description of each alternative for which a variance is required. This description also should specify the treatment level range(s) that the treatment technology would attain for each waste constituent restricted under the LDRs and the primary contaminants of concern identified during the Superfund baseline risk assessment. (The more specific and detailed information, such as relevant waste analysis data from sampling, should be placed in an appendix to the report.) In addition, under the Comparative Analysis of Alternatives section, when discussing the "Compliance with ARARs Criteria," site managers should indicate which alternatives will require a Treatability Variance to comply with the LDRs.

Highlight 3 - SAMPLE LANGUAGE FOR THE PROPOSED PLAN

Description of Alternatives section

This alternative will comply with the LDRs through a Treatability Variance under 40 CFR 268.44. This Variance will result in the use of [specify technology] to attain the Agency's interim "treatment levels/ranges" for the contaminated soil at the site (see Detailed Analysis of Alternatives Chapter of the FS Report for the specific treatment levels for each constituent).

Evaluation of Alternatives section, under "Compliance with ARARs"

The LDRs are ARARs for [Enter number] of [Enter total number of alternatives] remedial alternatives being considered. [Enter number] of the [Enter total number of alternatives] alternatives would comply with the LDRs through a Treatability Variance.

Community's Role in the Selection Process section

This Proposed Plan also seeks comment on the use of a Treatability Variance to comply with LDRs for each of the alternatives for which one is required.

Proposed Plan

The intent to seek a Treatability Variance for a particular alternative should be clearly stated in the Description of Alternatives section of the Proposed Plan. Because the Proposed Plan solicits public comment on al of the alternatives and not just the preferred option, the intent to obtain a Treatability Variance should be identifie for every alternative for which a Variance is required. Thi opportunity for public comment on the Proposed Plan fulfill the requirements for public notice and comment on th Treatability Variance as required in RCRA §268.44. Sampl language for the Proposed Plan is provided in **Highlight 3**

Record of Decision

A Treatability Variance is granted and becomes effectiv when the Record of Decision (ROD) is signed by th Regional Administrator or Assistant Administrato OSWER. The documentation provided in the ROD for Treatability Variance should be a concise synopsis of th information provided in the FS Report. In the Descriptio of Alternatives section, as part of the discussion of maj applicable requirements associated with each remedi option, site managers should include a statement (as wa done in the FS report) that explains why a Treatabilit Variance is justified and should list the treatment leve range(s) that the selected technology will attain for eac constituent. Sample language for the ROD is provided **Highlight 4**.

Highlight 4: SAMPLE LANGUAGE FOR A RECORD OF DECISION

Description of Alternatives section:

Because existing and available data do not demonstrate that the full-scale operation of this treatment technology can attain the LDR treatment standards consistently for all soil and debris wastes to be addressed by this action, this alternative will comply with the LDRs through a Treatability Variance for the wastes that cannot be treated to meet the standard. The treatment level range established through a Treatability Variance that [Enter technology] will attain for each constituent as determined by the indicated analyses are:

Barium	*0.1 - 40 ppm (TCLP)*
Mercury	*0.0002 - 0.008 ppm (TCLP)*
Vanadium	*0.2 - 22 ppm (TCLP)*
TCE	*95-99.9% reduction (TWA)*
Cresols	*90-99.9% reduction (TWA)*

In the Comparative Analysis section, under "Complian with ARARs," site managers should indicate which of th alternatives will comply with the LDRs through Treatability Variance. Under the Statutory Determinati section (Compliance with ARARs), site managers shou identify the LDRs as an ARAR and indicate that Treatability Variance is being used to comply.

HOW TO COMPLY WITH A TREATABILITY VARIANCE FOR SOIL AND DEBRIS WASTES

Soil Wastes

Once site managers have identified the RCRA waste codes present at the site, the next step is to identify the BDAT constituents of those RCRA waste codes found at the site, and to divide these constituents into one of the structural/functional groups shown in column 1 of **Highlight 5**. After dividing the BDAT constituents into their respective structural/functional groups, the next step is to compare the concentration of each constituent with the **threshold concentration** (see column 3 of **Highlight 5**) and to select the appropriate concentration level or percent reduction range. If the concentration of the restricted constituent is less than the threshold concentration, the waste should be treated to within the concentration range. If the waste concentration is above the threshold, the waste should be treated to reduce the concentration of the waste to within the specified percent reduction range. Once the appropriate treatment range is selected, the third step is to identify and select a specific technology that can achieve the necessary concentration or percent reduction. Column 5 of **Highlight 5** lists technologies that (based on existing performance data) can attain the alternative Treatability Variance levels.

During the implementation of the selected treatment technology, periodic analysis using the appropriate testing procedure (i.e., total waste analysis for organics and TCLP for inorganics) will be required to ensure the alternate treatment levels for the BDAT constituents requiring control are being attained and thus can be land disposed without further treatment.

Highlight 5. ALTERNATE TREATABILITY VARIANCE LEVELS AND TECHNOLOGIES FOR STRUCTURAL/FUNCTIONAL GROUPS

Structural Functional Groups	Concentration Range (ppm)	Threshold Concentration (ppm)	Percent Reduction Range	Technologies that achieved recommended effluent concentration guidance**
ORGANICS				
Halogenated Non-Polar Aromatics	0.5 - 10	100	90 - 99.9	Biological Treatment, Low Temp. Stripping, Soil Washing, Thermal Destruction
Dioxins	0.00001 - 0.05	0.5	90 - 99.9	Dechlorination, Soil Washing, Thermal Destruction
PCBs	0.1 - 10	100	90 - 99.9	Biological Treatment, Dechlorination, Soil Washing, Thermal Destruction
Herbicides	0.002 - 0.02	0.2	90 - 99.9	Thermal Destruction
Halogenated Phenols	0.5 - 40	400	90 - 99	Biological Treatment, Low Temp. Stripping, Soil Washing, Thermal Destruction
Halogenated Aliphatics	0.5 - 2	40	95 - 99.9	Biological Treatment, Low Temp. Stripping, Soil Washing, Thermal Destruction
Halogenated Cyclics	0.5 - 20	200	90 - 99.9	Thermal Destruction
Nitrated Aromatics	2.5 - 10.0	10,000	99 - 99.99	Biological Treatment, Soil Washing Thermal Destruction
Heterocyclics	0.5 - 20	200	90 - 99.9	Biological Treatment, Low Temp. Stripping, Soil Washing, Thermal Destruction
Polynuclear Aromatics	0.5 - 20	400	95 - 99.9	Biological Treatment, Low Temp. Stripping, Soil Washing, Thermal Destruction
Other Polar Organics	0.5 - 10	100	90 - 99.9	Biological Treatment, Low Temp. Stripping, Soil Washing, Thermal Destruction
INORGANICS				
Antimony	0.1 - 0.2	2	90 - 99	Immobilization
Arsenic	0.27 - 1	10	90 - 99.9	Immobilization, Soil Washing
Barium	0.1 - 40	400	90 - 99	Immobilization
Chromium	0.5 - 6	120	95 - 99.9	Immobilization, Soil Washing
Nickel	0.5 - 1	20	95 - 99.9	Immobilization, Soil Washing
Selenium	0.005	0.08	90 - 99	Immobilization
Vanadium	0.2 - 22	200	90 - 99	Immobilization
Cadmium	0.2 - 2	40	95 - 99.9	Immobilization, Soil Washing
Lead	0.1 - 3	300	99 - 99.9	Immobilization, Soil Washing
Mercury	0.0002 - 0.008	0.06	90 - 99	Immobilization

---

* *TCLP also may be used when evaluating waste with relatively low levels of organics that have been treated through an immobilization process.*

** *Other technologies may be used if treatability studies or other information indicates that they can achieve the necessary concentration or percent reduction range.*

Because of the variable and uncertain characteristics associated with unexcavated wastes, from which only sampling data are available, treatment systems generally should be designed to achieve the more stringent end of the treatment range (e.g., 0.5 for chromium, see column 2 of **Highlight 5**) to ensure that the treatment residuals from the most contaminated portions of the waste fall below the "no exceedance" levels (e.g., 6.0 ppm for chromium). Should data indicate that the treatment levels set through the Treatability Variance are not being attained (i.e., treatment residuals are greater than the "no exceedance" level), site managers should consult with Headquarters.

Under some circumstances, the need to obtain a Treatability Variance may not be evident until after a ROD is signed. This situation may arise when: (1) initial assumptions made during the RI/FS that the LDR treatment standards would be met are proven to be incorrect during the remedial design/action (RD/RA) phase; or (2) previously undiscovered evidence is obtained during RD/RA that the CERCLA waste contains a RCRA restricted waste and the LDRs are then determined to be applicable but cannot be met. In such situations, a site manager would need to prepare an explanation of significant differences (ESD) from the ROD and make it available to the public to explain the need for a Treatability Variance. In addition, unlike other ESDs that do not require public comment under CERCLA section 117(c), if the ESD involves granting a Treatability Variance, an opportunity for public comment would be required to fulfill the public notice and comment requirements for a Treatability Variance under 40 CFR §268.44.

Debris Wastes

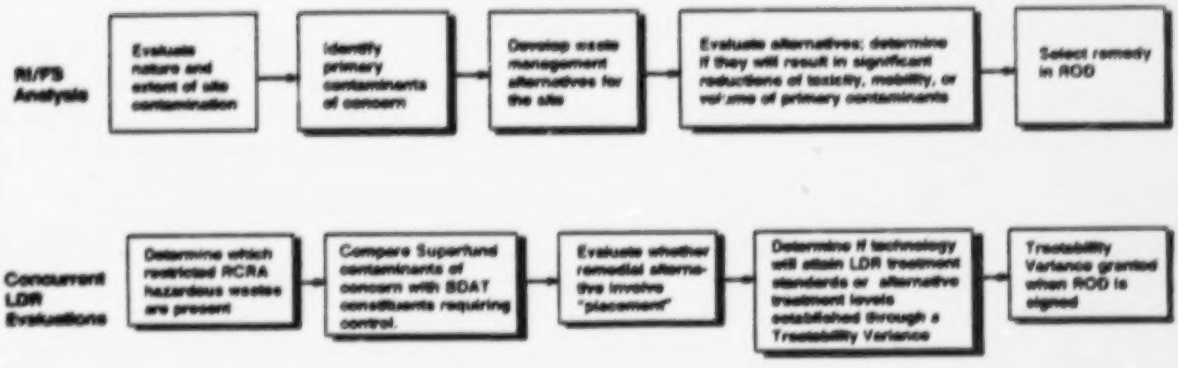
Site managers should use the same process for obtaining a Treatability Variance described above for types of debris that are able to be treated to the alternate treatment levels (e.g., paper, plastic). However, for most types of debris (e.g., concrete, steel pipes), which generally cannot be treated, site managers should use best management practices. Depending on the specific characteristics of the debris, these practices may include decontamination (e.g., triple rinsing) or destruction.

LDRs IN SUPERFUND ACTIONS

Because of the important role the LDRs may play in Superfund cleanups, site managers need to incorporate early in the RI/FS the neccesary investigative and analytical procedures to determine if the LDRs are applicable for remedial alternatives that involve the "placement" of wastes When the LDRs are applicable, site managers should determine if the treatment processes associated with the alternatives can attain either the LDR treatment standard or the alternate levels that would be established under Treatability Variance.

Site managers must first evaluate whether restricte RCRA waste codes are present at the site, identify th BDAT constituents requiring control, and compare th BDAT constituents with the Superfund primary constituent of concern from the baseline risk assessment. This proces identifies all of the constituents for which remediation ma be required. Once the viable alternatives are identified i the FS, site managers should evaluate those involving th treatment and placement of restricted RCRA hazardou wastes to ensure their respective technology process(es) wi attain the appropriate treatment levels (i.e., either LD treatment standard or Treatability Variance alternat treatment levels for restricted RCRA hazardous wastes and, in accordance with Superfund goals, reductions of 9 percent or greater for Superfund primary contaminants concern. The results of these evaluations are documente in the Proposed Plan and ROD. An illustration of th integration of LDRs and Superfund is shown in **Highligh 6**. An example of the process for complying with Treatability Variance for contaminated soil and debris presented in **Highlight 7**.

Highlight 6.
LDRs in the RI/FS Process


RI/FS Analysis
Evaluate nature and extent of site contamination
Identify primary contaminants of concern
Develop waste management alternatives for the site
Evaluate alternatives; determine if they will result in significant reductions of toxicity, mobility, or volume of primary contaminants
Select remedy in ROD
Concurrent LDR Evaluations
Determine which restricted RCRA hazardous wastes are present
Compare Superfund contaminants of concern with BDAT constituents requiring control.
Evaluate whether remedial alternative involve "placement"
Determine if technology will attain LDR treatment standards or alternative treatment levels established through a Treatability Variance
Treatability Variance granted when ROD is signed

Highlight 7: IDENTIFICATION OF TREATMENT LEVELS FOR A TREATABILITY VARIANCE

As part of the RI, it has been determined that soils in one location at a site contain F006 wastes and cresols (which site records indicate were an F004 waste). Arsenic also was found in soils at a separate location. The baseline risk assessment identified cadmium, chromium, lead, and arsenic as primary contaminants of concern. The concentration range of all of the constituents found at the site included:

Constituent	Total Concentration (mg/kg)	TCLP (mg/l)	Constituent	Total Concentration (mg/kg)	TCLP (mg/l)
Cadmium	2,270 - 16,200	120 - 146	Nickel	100 - 140	1 - 6.5
Chromium	3,160 - 4,390	30 - 56	Silver	1 - 3	—
Cyanides	80 - 150	1 - 16	Cresols	50 - 600	.25 - 4
Lead	500 - 625	2 - 12.5	Arsenic	800 - 1,900	3 - 9

Four remedial alternatives are being considered: (1) Low temperature thermal stripping of soil contaminated with cresols followed by stabilization of the ash; (2) Stabilization of the soil in a mobile unit; (3) In-situ stabilization; and (4) Capping of wastes. Each of these alternatives must be evaluated to determine if they will result in significant reduction of the toxicity, mobility, or volume of the waste; whether "placement" occurs, and, if "placement" occurs, whether the treatment will attain LDR treatment standards or alternative treatment levels established through a Treatability Variance for the BDAT constituents requiring control.

STEP 1: IDENTIFY THE RESTRICTED CONSTITUENTS

- Because F006 and F004 wastes have been identified at the site, the Superfund site manager must meet the treatment standards or alternate treatment levels established through a Treatability Variance for the BDAT constituents. These constituents are: **Cadmium, Chromium, Lead, Nickel, Silver**, and **Cyanide** for F006 and **Cresols** for F004.

  AND DIVIDE THE CONSTITUENTS INTO THEIR STRUCTURAL/FUNCTIONAL GROUPS (see Highlight 4):

  - All of the F006 constituents are in the **Inorganics** structural/functional group.
  - Cresols are in the **Other Polar Organic Compounds** structural/functional group.

- In accordance with program goals, the preferred remedy also should result in the effective reduction (i.e., at least 90 percent) of all primary constituents of concern (i.e., **Cadmium, Chromium, Lead, and Arsenic**).

STEP 2: COMPARE THE CONCENTRATION THRESHOLD FOUND IN HIGHLIGHT 5 TO THE CONCENTRATIONS FOUND AT THE SITE AND CHOOSE EITHER THE CONCENTRATION LEVEL RANGE OR PERCENT REDUCTION RANGE FOR EACH RESTRICTED CONSTITUENT.

Constituent	Site Concentration		Threshold Concentration	Appropriate Range		Range to be achieved (compliance analysis)
				Concentration	Percent Reduction	
Cadmium	120 - 146 ppm	>	40 ppm		X	95-99.9 Percent Reduction (TCLP)
Chromium	30 - 56 ppm	<	120 ppm	X		0.5 - 6 ppm (TCLP)
Lead	2 - 12.5 ppm	<	300 ppm	X		0.1 - 3 ppm (TCLP)
Nickel	1 - 6.5 ppm	<	20 ppm	X		0.5 - 1 ppm (TCLP)
Cresols	50 - 600 ppm	>	100 ppm		X	90-99.9 Percent Reduction (TCLP)

STEP 3: IDENTIFY TREATMENT TECHNOLOGIES THAT MEET THE TREATMENT RANGES.

- **Highlight** 5 lists the technologies that achieved the alternate treatment levels for each structural/functional group.
- Because cresols are present in relatively low concentrations (assumed for the purposes of this example), a TCLP may be used to determine if immobilization results in a sufficient reduction of mobility of this restricted RCRA hazardous waste. (Measures to address any volatization of organics during immobilization processes will be necessary.)
- Immobilization also will result in the effective reduction in leachability (i.e., at least 90 percent) of arsenic, a Superfund primary contaminant of concern.

Alternative	Effective Reduction of Toxicity, Mobility, Volume?	"Placement?"	Meet LDR Treatment Standards for BDAT Constituents	Meet Treatability Variance Alternate Levels?
1. Low temperature stripping/ Stabilization	Yes	Yes	No*	Yes
2. Stabilization in mobile unit	Yes	Yes	No (not for cresols)	Yes
3. In-situ stabilization	Yes (Mobility)	No (LDRs not ARARs)	—	—
4. Capping in Place	No	No (LDRs not ARARs)	—	—

* Treatability studies conducted during RI/FS indicated the standard could not be met consistently for all soils contaminated with cresols.

- After balancing the tradeoffs among alternatives with respect to the nine evaluation criteria, the Agency determined that stabilization of wastes in a mobile unit is the preferred alternative. The next step is to seek and obtain a Treatability Variance for the preferred alternative in the Proposed Plan and ROD.

Appendix B

COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

INDEX

TABLE OF CONTENTS

Category - Subcategory	Number Series*	Page
Pre-Remedial	0001-0002	1
Removal Action	1000-1008	1
RI/FS - General	2000-2012	2
RI/FS - RI Data Quality/Site & Waste Assessment	2100-2119	2
RI/FS - Land Disposal Facility Technology	2200-2212	4
RI/FS - Other Technologies	2300-2320	5
RI/FS - Ground-Water Monitoring & Protection	2400-2408	7
ARARs	3000-3005	8
Water Quality	4000-4003	9
Risk Assessment	5000-5015	9
Cost Analysis	6000-6001	11
Community Relations	7000-7000	11
Enforcement	8000-8001	12
Selection of Remedy/Decision Documents	9000-9001	12
Data Element Definitions		
List of Organizational Abbreviations and Acronyms Identified in the Index		

---

*The range for each number series identified represents the numbers assigned to those documents currently in the Compendium.

-INDEX-

COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

IDX NO	VOL	TITLE	DATE	AUTHORS	STATUS	PAGES	TIER	ATTACHMENTS	OSWER/EPA NUMBER
0000	1	INDEX TO COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS	05/01/89	- OPPE - PRC ENVIRONMENTAL MANAGEMENT, INC.	Final	0		1) DATA ELEMENT DEFINITIONS 2) ORGANIZATIONAL ABBREVIATIONS AND ACRONYMS IDENTIFIED IN INDEX	
**		Pre-Remedial							
0001	1	EXPANDED SITE INSPECTION TRANSITIONAL GUIDANCE FOR FY 88	10/01/87	- OERR	Final	74	2		OSWER #9345.1-02
0002	1	PRELIMINARY ASSESSMENT GUIDANCE FISCAL YEAR 1988	01/01/88	- OERR/HSCD	Final	83	2		OSWER #9345.0-01
**		Removal Action							
1000	1	CERCLA REMOVAL ACTIONS AT METHANE RELEASE SITES	07/23/86	- LONGEST, H.L. /OERR	Final	2	2		OSWER #9360.0-8
1001	1	COSTS OF REMEDIAL RESPONSE ACTIONS AT UNCONTROLLED HAZARDOUS WASTE SITES	01/01/81	- RISHEL, H.L., ET AL /SCS ENGINEERS - ALBRECHT, O.W. /MERL	Final	164	1		
1002	1	EMERGENCY RESPONSE PROCEDURES FOR CONTROL OF HAZARDOUS SUBSTANCE RELEASES	01/01/84	- MELVOLD, R.W./ROCKWELL INTERNATIONAL - MCCARTHY, L.T. /MERL	Final	23	1		EPA 600/2-84-023
1003	1	ENVIRONMENTAL REVIEW REQUIREMENTS FOR REMOVAL ACTIONS	04/13/87	- OERR/ERD	Final	6	2		OSWER #9318.0-05
1004	1	GUIDANCE ON IMPLEMENTATION OF THE "CONTRIBUTE TO REMEDIAL PERFORMANCE" PROVISION	04/06/87	- OERR	Final	6	2		OSWER #9360.0-13
1008	2	GUIDANCE ON NON-NPL REMOVAL ACTIONS INVOLVING NATIONALLY SIGNIFICANT OR PRECEDENT SETTING ISSUES	04/03/89	- LONGEST, H.L. /OERR	Final	9	2	1) REQUEST FOR CONCURRENCE	OSWER #9360.0-19
1005	1	INFORMATION ON DRINKING WATER ACTION LEVELS	04/19/88	- FIELDS, JR., T./OSWER/ERD	Final	17	2	1) MEMO: RELEASES FROM LAWFULLY APPLIED PESTICIDES 2) MEMO: [illegible] CONTAMINATION 3) GUIDANCE FOR ETHYLENE DIBROMIDE IN DRINKING H2O	
1006	1	SUPERFUND REMOVAL PROCEDURES, REVISION #3	02/01/88	- OSWER/OERR	Final	365	1		OSWER #9360.0-03B
1007	1	THE ROLE OF EXPEDITED RESPONSE ACTIONS UNDER SARA	04/21/87	- LONGEST, H.L. /OERR	Final	3	2		OSWER #9360.0-15
4012	26	INTERIM FINAL GUIDANCE ON REMOVAL ACTION LEVELS AT CONTAMINATED DRINKING WATER SITES [Secondary Reference]	10/06/87	- OSWER/OERR	Final	9	2		OSWER #9360.1-01
6011	32	REMOVAL COST MANAGEMENT MANUAL [Secondary Reference]	04/01/88	- OSWER/OERR	Final	170	1		OSWER #9360.0-02B

-INDEX-

COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

TAB NO	Vol	Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA NUMBER
**		RI/FS General							
2000	2	CASE STUDIES 1-23: REMEDIAL RESPONSE AT HAZARDOUS WASTE SITES	03/01/84	- CH2M HILL/MERL - OSWER/OERR	Final	830	1		EPA 540/2-84/002B
2001	3	EPA GUIDE FOR MINIMIZING THE ADVERSE ENVIRONMENTAL EFFECTS OF CLEANUP OF UNCONTROLLED HAZARDOUS-WASTE SITES	06/01/85	- ENVIRONMENTAL RESEARCH LABORATORY	Final	250	2		EPA/600/8-85/008
2002	3	GUIDANCE FOR CONDUCTING REMEDIAL INVESTIGATIONS AND FEASIBILITY STUDIES UNDER CERCLA	10/01/88	- OSWER/OERR	Final	390	1		OSWER #9355.3-01
2003	3	JOINT CORPS/EPA GUIDANCE	06/24/83	- OERR/PAS	Final	42	2		OSWER #9295.2-02
2004	4	MODELING REMEDIAL ACTIONS AT UNCONTROLLED HAZARDOUS WASTE SITES (VOL I-IV)	04/01/85	- [illegible] S.H. ET AL /ANDERSON-NICHOLS AND CO OSWER/OERR [illegible] D.C. AND [illegible] JR T.D./[illegible]	Final	350	1		OSWER #9355.0-08
2005	4	POLICY ON FLOODPLAINS AND WETLAND ASSESSMENTS FOR CERCLA ACTIONS	08/01/85	- HEDEMAN JR, W.N./OERR LUCERO, G./OWPE	Final	9	2		OSWER #9280.0-02
2006	4	REMEDIAL RESPONSE AT HAZARDOUS WASTE SITES: SUMMARY REPORT	03/01/84	- CH2M/MERL	Final	95	1		EPA 540/2-84/002A
2007	4	REVISED PROCEDURES FOR IMPLEMENTING OFF-SITE RESPONSE ACTIONS	11/13/87	- PORTER, J.W./OSWER	Final	20	2		OSWER #9834.11
2008	4	RI/FS IMPROVEMENTS	07/23/87	- LONGEST, H.L./OERR	Final	11	2	13 RI/FS IMPROVEMENTS	OSWER #9355.0-20
2009	4	RI/FS IMPROVEMENTS FOLLOW-UP	04/25/88	- LONGEST, H.L./OERR	Final	16	2	13 RI/FS IMPROVEMENTS FOLLOW-UP 21 REMEDIAL INFORMATION TRANSFER ACTIVITIES	OSWER #9355.3-05
2010	4	SUPERFUND FEDERAL-LEAD REMEDIAL PROJECT MANAGEMENT HANDBOOK	12/01/86	- OERR	Draft	170	1		OSWER #9355.1-1
2011	5	SUPERFUND REMEDIAL DESIGN AND REMEDIAL ACTION GUIDANCE	06/01/86	- OERR	Final	100	1		OSWER #9355.0-4A
2012	5	SUPERFUND STATE-LEAD REMEDIAL PROJECT MANAGEMENT HANDBOOK	12/01/86	- OERR	Final	120	1		OSWER #9355.2-1
**		RI/FS: RI Data Quality/Site & Waste Assessment							
2100	5	A COMPENDIUM OF SUPERFUND FIELD OPERATIONS METHODS	12/01/87	- OERR - OWPE	Final	550	1		OSWER #9355.0-14
2101	6	DATA QUALITY OBJECTIVES FOR REMEDIAL RESPONSE ACTIVITIES: DEVELOPMENT PROCESS	03/01/87	- CDM FEDERAL PROGRAMS CORP - OERR/OWPE	Final	150	1		OSWER #9355.0-7B

-INDEX-

COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

DOC NO	Vol	Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
2102	6	DATA QUALITY OBJECTIVES FOR REMEDIAL RESPONSE ACTIVITIES: EXAMPLE SCENARIO: RI/FS ACTIVITIES AT A SITE W/ CONTAMINATED SOILS AND GROUNDWATER	03/01/87	- CDM FEDERAL PROGRAMS CORP - OERR/OWPE	Final	130	1		OSWER #9355.0-7B
2103	6	DESIGN AND DEVELOPMENT OF HAZARDOUS WASTE REACTIVITY TESTING PROTOCOL	02/01/84	- WOLBACH, C.D., ET AL./[illegible] CORP - BARKLEY, N./HWERL	Final	150	1		EPA 600/2-84-057
2104	6	FIELD SCREENING FOR ORGANIC CONTAMINANTS IN SAMPLES FROM HAZARDOUS WASTE SITES	04/02/86	- HOFFMAN, H.R., ET AL./NUS CORP - CARTER, A./MICHIGAN DEPT. OF NATURAL RESOURCES - THOMAS, T./EPA	Final	11	2	1) MEMO: FIELD SCREENING FOR ORGANIC CONTAMINANTS	
2105	6	FIELD SCREENING METHODS CATALOG: USER'S GUIDE	09/01/88	- OERR/HSED	Final	90	1		EPA/540/2-88/005
2106	6	FIELD STANDARD OPERATING PROCEDURES MANUAL #4-SITE ENTRY	01/01/85	- OERR/ERD	Final	29	2		OSWER #9285.2-01
2107	7	FIELD STANDARD OPERATING PROCEDURES MANUAL #6-WORK ZONES	04/01/85	- OERR/ERD	Final	19	2		OSWER #9285.2-04
2108	7	FIELD STANDARD OPERATING PROCEDURES MANUAL #8 AIR SURVEILLANCE	01/01/85	- OERR/ERD	Final	24	2		OSWER #9285.2-03
2109	7	FIELD STANDARD OPERATING PROCEDURES MANUAL #9-SITE SAFETY PLAN	04/01/85	- OERR/ERD	Final	26	2	1) SAMPLE SITE SAFETY PLAN AND GENERIC SAFETY PLAN 2) EMERGENCY OPERATION CODES REAL TIME MONITOR 3) RESPONSE SAFETY CHECK-OFF SHEET	OSWER #9285.2-05
2110	7	GEOPHYSICAL METHODS FOR LOCATING ABANDONED WELLS	07/01/84	- FRISCHKNECHT, F.C., ET AL./U.S. GEOLOGICAL SURVEY - VAN EE, J.J./EMSL	Final	211	1		EPA-600/4-84-065
2111	7	GEOPHYSICAL TECHNIQUES FOR SENSING BURIED WASTES AND WASTE MIGRATION	06/01/84	- BENSON, R.C., ET AL./TECHNOS, INC. - VAN EE, J.J./EMSL	Final	236	1		EPA-600/7-84/064
2112	8	GUIDELINES AND SPECIFICATIONS FOR PREPARING QUALITY ASSURANCE PROGRAM DOCUMENTATION	06/01/87	- ORD/QUALITY ASSURANCE MANAGEMENT STAFF	Final	31	2	1) MEMO: GUIDANCE ON PREPARING QAPPS DATED 6/10/87	
2113	8	LABORATORY DATA VALIDATION FUNCTIONAL GUIDELINES FOR EVALUATING INORGANICS ANALYSES	07/01/88	- EPA DATA REVIEW WORK GROUP - BLEYLER, R./VIAR AND CO./SAMPLE MGMT OFFICE - HSED	Draft	20	2		
2114	8	LABORATORY DATA VALIDATION FUNCTIONAL GUIDELINES FOR EVALUATING ORGANICS ANALYSES	02/01/88	- BLEYLER, R./VIAR AND CO./SAMPLE MGMT OFFICE - EPA DATA REVIEW WORKGROUP - HSED	Draft	45	2		

251

-INDEX-
COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

Doc NO.	Vol	Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
2115	8	A PRACTICAL GUIDE FOR GROUND-WATER SAMPLING	09/01/85	- BARCELONA, M.J. ET AL /ILLINOIS ST WATER SURVEY - SCALF, M.R. /ORD/RSKERL	Final	175	1		EPA/600/2-85/104
2116	8	SEDIMENT SAMPLING QUALITY ASSURANCE USER'S GUIDE	07/01/85	- BARTH, D.S. & STARKS, T.H./UNIV OF NEV, LAS VEGAS - BROWN, K.W./EMSL	Final	120	1		EPA/600/4-85/048
2117	8	SOIL SAMPLING QUALITY ASSURANCE USER'S GUIDE	05/01/84	- BARTH, D.S. & MASON, B.J./U OF NEVADA, LAS VEGAS - BROWN, K./ORD/EMSL	Final	104	1		EPA 600/4-84/043
2118	9+	TEST METHODS FOR EVALUATING SOLID WASTE: LABORATORY MANUAL PHYSICAL/CHEMICAL METHODS, THIRD EDITION (VOLUMES IA, IB, IC, AND II)	11/01/86	- OSWER	Final	3000	1		
2119	11	USER'S GUIDE TO THE CONTRACT LABORATORY PROGRAM	12/01/88	- OERR/CLP SAMPLE MANAGEMENT OFFICE	Final	230	2		OSWER #9240.0-1
**		III.05 - Land Disposal Facility Technology							
2200	12	COVERS FOR UNCONTROLLED HAZARDOUS WASTE SITES	09/01/85	- MCANENY, C.C. ET AL /U.S. COE/WES - HERRMANN, J.G./HWERL	Final	475	2		EPA/540/2-85/002
2201	13	DESIGN, CONSTRUCTION, AND EVALUATION OF CLAY LINERS FOR WASTE MANAGEMENT FACILITIES	11/01/88	- GOLDMAN, L.J. ET AL /ALA - ROULIER, M.H./RREL	Final	500	2		EPA/530/SW-86/007F
2202	13	EVALUATING COVER SYSTEMS FOR SOLID AND HAZARDOUS WASTE	09/01/82	- LUTTON, R.J./U.S.A. COE/WES - LANDRETH, R.E./MERL	Final	58	2		OSWER #9476.00-1
2203	13	GUIDANCE MANUAL FOR MINIMIZING POLLUTION FROM WASTE DISPOSAL SITES	08/01/78	- TOLMAN, A.L. ET AL /A.W. MARTIN ASSOCIATES, INC - SANNING, D.E./MERL	Final	83	1		EPA-600/2-78-142
2204	13	LAND DISPOSAL RESTRICTIONS	08/11/87	- LONGEST, H.L./OERR - LUCERO, G./OWPE	Final	23	2	1) SUMMARY OF MAJOR LDR PROVISIONS AND CALIFORNIA LIST PROHIBITIONS 2) OTHER ATTACHS CITED NOT AVAILABLE ON	

-INDEX-

COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

DOC NO.	Vol	Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
2205	14	LINING OF WASTE CONTAINMENT AND OTHER IMPOUNDMENT FACILITIES	09/01/88	- MATRECON INC - LANDRETH R /RISK REDUCTION ENGINEERING LAB	Final	950	2	FED. REG.	
2206	15	LINING OF WASTE IMPOUNDMENT AND DISPOSAL FACILITIES	03/01/83	- LANDRETH R /MERL	Final	480	2		OSWER #9480.00-4
2207	15	PROCEDURES FOR MODELING FLOW THROUGH CLAY LINERS TO DETERMINE REQUIRED LINER THICKNESS	01/01/84	- CDM	Draft	145	2		OSWER #9480.00-10
2208	15	RCRA GUIDANCE DOCUMENT: LANDFILL DESIGN LINER SYSTEMS AND FINAL COVER	07/01/82	- EPA	Draft	30	2		
2209	15	SETTLEMENT AND COVER SUBSIDENCE OF HAZARDOUS WASTE LANDFILLS PROJECT SUMMARY	05/01/85	- MURPHY W L - GILBERT P A	Final	4	2		EPA-600/S2-85-035
2210	15	SUPPLEMENTARY GUIDANCE ON DETERMINING LINER/LEACHATE COLLECTION SYSTEM COMPATIBILITY	08/07/86	- WEDDLE B R /PERMITS AND STATE PROGRAMS DIV	Final	60	2	1) ANALYSIS AND ENGINEERING OF UNEXPOSED & EXPOSED POLYMERIC MEMBRANE LINERS MATRECON INC 2) SEC. 3019 EXPOSURE INFO. AND HEALTH ASSESSMENTS	OSWER #9480.00-13
2211	15	TECHNICAL GUIDANCE DOCUMENT: CONSTRUCTION QUALITY ASSURANCE FOR HAZARDOUS WASTE LAND DISPOSAL FACILITIES	10/01/86	- HERRMANN J G /HWERL/LAND POLLUTION CONTROL DIV - OSWER	Final	88	2		OSWER #9472.003
2212	15	TREATMENT OF REACTIVE WASTES AT HAZARDOUS WASTE LANDFILLS PROJECT SUMMARY	01/01/84	- [illegible] D ET AL /ARTHUR D. LITTLE INC - LANDRETH R /MERL	Final	4	2		EPA/600/S2-83/118
3000	25	APPLICABILITY OF THE HSWA MINIMUM TECHNICAL REQUIREMENTS RESPECTING LINERS AND LEACHATE COLLECTION SYSTEMS [Secondary Reference]	06/01/85	- SKINNER J H/OSW	Final	3	2		OSWER #9480.01(85)
**	01/25	Other Technologies							
2300	16	A COMPENDIUM OF TECHNOLOGIES USED IN THE TREATMENT OF HAZARDOUS WASTES	09/01/87	- ORD/CERI	Final	40	2		EPA/625/8-87/014

-INDEX-
COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

DOC NO	VOL	TITLE	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
2301	16	CARBON ADSORPTION ISOTHERMS FOR TOXIC ORGANICS	04/01/80	- DOBBS, R A /MERL - COHEN, J M /MERL	Final	321	2		EPA/600/8-80-023
2302	17	ENGINEERING HANDBOOK FOR HAZARDOUS WASTE INCINERATION	09/01/81	- BONNER, T A , ET AL /MONSANTO RESEARCH CORP - OBERACKER, D A /IERL	Final	445	2		OSWER #9488.00-5
2303	17	EPA GUIDE FOR IDENTIFYING CLEANUP ALTERNATIVES AT HAZARDOUS WASTE SITES AND SPILLS: BIOLOGICAL TREATMENT	--	- PACIFIC NORTHWEST LABORATORY - [illegible], L C /CORVALLIS ENVIRONMENTAL RESEARCH LAB	Final	120	2		EPA-600/3-83-063
2304	17	EPA GUIDE FOR INFECTIOUS WASTE MANAGEMENT	05/01/86	- OSWER/OSW	Final	75	2		OSWER #9410.00-2
2305	17	GUIDANCE DOCUMENT FOR CLEANUP OF SURFACE IMPOUNDMENT SITES	06/01/86	- CDM/WOODWARD-CLYDE/ROY F. WESTON - BARTH, E /ORD	Final	99	1		OSWER #9380.0-06
2306	17	GUIDANCE DOCUMENT FOR CLEANUP OF SURFACE TANK AND DRUM SITES	05/28/85	- CDM/WOODWARD-CLYDE/ROY F. WESTON/C.C. JOHNSON - BARTH, E AND BIXLER, B /ORD	Final	135	1		OSWER #9380.0-03
2307	18	HANDBOOK FOR EVALUATING REMEDIAL ACTION TECHNOLOGY PLANS	08/01/83	- EHRENFELD, J AND BASS, J /ARTHUR D LITTLE INC - PAHREN, H R /MERL	Final	430	1		EPA-600/2-83-076
2308	18	HANDBOOK FOR STABILIZATION/SOLIDIFICATION OF HAZARDOUS WASTE	06/01/86	- CULLINANE JR, M J , ET AL /U S COE/WES - HOUTHOOFD, J M /HWERL	Final	125	1		EPA/540/2-86-001
2309	19	HANDBOOK REMEDIAL ACTION AT WASTE DISPOSAL SITES (REVISED)	10/01/85	- ORD/HWERL - OSWER/OERR	Final	560	1		EPA/625/6-85/006
2310	20	LEACHATE PLUME MANAGEMENT	11/01/85	- REPA, E AND KUFS, C /JRB ASSOCIATES - BARKLEY, N /EPA	Final	590	1		EPA/540/2-85/004
2311	20	MOBILE TREATMENT TECHNOLOGIES FOR SUPERFUND WASTES	09/01/86	- CAMP, DRESSER AND MCKEE INC - [illegible], I D /ORSD	Final	130	1		EPA/540/2-86-003
2312	21	PRACTICAL GUIDE: TRIAL BURNS FOR HAZARDOUS WASTE INCINERATORS	04/01/86	- GORMAN, P , ET AL /MIDWEST RESEARCH INSTITUTE - OBERACKER, D A /HWERL	Final	63	1		EPA/600/2-86/050
2313	21	PRACTICAL GUIDE: TRIAL BURNS FOR HAZARDOUS WASTE INCINERATORS PROJECT SUMMARY	07/01/86	- GORMAN, P , ET AL /MIDWEST RESEARCH INSTITUTE - OBERACKER, D A /HWERL	Final	2	1		EPA/600/S2-86/050

-INDEX-
COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

DOC NO	Vol	Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
2314	21	PROHIBITION ON THE PLACEMENT OF BULK LIQUID HAZARDOUS WASTE IN LANDFILLS STATUTORY INTERPRETIVE GUIDANCE	06/11/86	- OSWER/OSW	Final	35	1	1) MEMO RE SAME SUBJECT FROM WILLIAMS, M.E. /OSW	OSWER #9487.00-2A
2315	21	REVIEW OF IN-PLACE TREATMENT TECHNIQUES FOR CONTAMINATED SURFACE SOILS VOL. 2 BACKGROUND INFORMATION FOR IN-SITU TREATMENT	11/01/84	- SIMS, R.C., ET AL /JRB ASSOCIATES - BARKLEY, N /HWERL	Final	350	1		EPA-540/2-84-003b
2316	21	REVIEW OF IN-PLACE TREATMENT TECHNIQUES FOR CONTAMINATED SURFACE SOILS VOL. 1 TECHNICAL EVALUATION	09/19/84	- OSWER/OERR - ORD/HWERL	Final	165	1		EPA/540/2-84-003a
2317	22	SLURRY TRENCH CONSTRUCTION FOR POLLUTION MIGRATION CONTROL	02/01/84	- OERR - ORD/HWERL	Final	220	1		EPA/540/2-84-001
2318	22	SYSTEMS TO ACCELERATE IN SITU STABILIZATION OF WASTE DEPOSITS	09/01/86	- AMDURER, M., ET AL /ENVIRESPONSE CO - GRUBE, W /HWERL	Final	285	1		EPA 540/2-86/002
2319	22	TECHNOLOGY SCREENING GUIDE FOR TREATMENT OF CERCLA SOILS AND SLUDGES	09/01/88	- OSWER/OERR	Final	130	1		EPA 540/2-88/004
2320	22	TREATMENT TECHNOLOGY BRIEFS: ALTERNATIVES TO HAZARDOUS WASTE LANDFILLS	07/01/86	- HWERL	Final	35	3		EPA/600/8-86/017
**		[illegible] Ground Water Monitoring & Protection							
2400	23	CRITERIA FOR IDENTIFYING AREAS OF VULNERABLE HYDROGEOLOGY UNDER RCRA STATUTORY INTERPRETIVE GUIDANCE	07/01/86	- OSWER/OSW	Final	950	2		OSWER #9472.00-2A
2401	24	FINAL RCRA COMPREHENSIVE GROUND-WATER MONITORING EVALUATION (CME) GUIDANCE DOCUMENT	12/19/86	- LUCERO, G.A. /OWPE	Final	55	2	1) RELATIONSHIP OF TECHNICAL INADEQUACIES TO GROUND WATER PERFORMANCE STANDARDS	OSWER #9950.2
2402	24	GROUND-WATER MONITORING AT CLEAN-CLOSING SURFACE IMPOUNDMENT AND WASTE PILE UNITS	03/31/88	- PORTER, J.W. /OSWER	Final	5	2		OSWER #9476.00-14
2403	24	GROUND-WATER PROTECTION STRATEGY	08/01/84	- OFFICE OF GROUND-WATER PROTECTION	Final	65	2		EPA/440/6-84-002
2404	24	GUIDELINES FOR GROUND-WATER CLASSIFICATION UNDER THE EPA GROUND-WATER PROTECTION STRATEGY	12/01/86	- OFFICE OF GROUND-WATER PROTECTION	Draft	600	2		
2405	24	OPERATION AND MAINTENANCE INSPECTION GUIDE (RCRA GROUND-WATER MONITORING SYSTEMS)	03/10/88	- OSWER/OWPE/RCRA ENFORCEMENT DIVISION	Final	50	2	1) TRANSMITTAL MEMO RE SAME SUBJECT	OSWER #9950.3

-INDEX-

COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

CRN NO.	Vol	Title	Date	Authors	Status	Pages	Vol	Attachments	OSWER/EPA Number
2406	24	PROTOCOL FOR GROUND-WATER EVALUATIONS	09/01/86	HAZARDOUS WASTE GROUND-WATER TASK FORCE	Final	300	2		OSWER #9080.0-1
2407	25	RCRA GROUND-WATER MONITORING TECHNICAL ENFORCEMENT GUIDANCE DOCUMENT (TEGD)	09/01/86	EPA	Final	370	2		OSWER #9950.1
2408	25	RCRA GROUND-WATER MONITORING TECHNICAL ENFORCEMENT GUIDANCE DOCUMENT (TEGD) EXECUTIVE SUMMARY	07/01/87	LUCERO, G.A./OWPE	Final	8	1		OSWER #9950.1-A

** ARARS

CRN NO.	Vol	Title	Date	Authors	Status	Pages	Vol	Attachments	OSWER/EPA Number
3000	25	APPLICABILITY OF THE RCRA MINIMUM TECHNICAL REQUIREMENTS RESPECTING LINERS AND LEACHATE COLLECTION SYSTEMS	04/?/85	SKINNER, J./OSW	Final	3	2		OSWER #9480.00-1(85)
3001	25	CERCLA COMPLIANCE WITH OTHER ENVIRONMENTAL STATUTES	10/02/85	PORTER, J.W./OSWER	Final	19	1	11 PROCEDURALLY APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS	OSWER #9234.0-2
3002	25	CERCLA COMPLIANCE WITH OTHER LAWS MANUAL	08/08/88	OERR	Draft	245	2		OSWER #9234.1-01
3003	25	EPA'S IMPLEMENTATION OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986	05/21/87	THOMAS, L.M./EPA	Final	4	2		
3004	25	GUIDANCE MANUAL ON THE RCRA REGULATION OF RECYCLED HAZARDOUS WASTES	03/01/86	ENGINEERING SCIENCE, INC. - OSW	Final	350	2		OSWER #9441.00-2
3005	25	INTERIM RCRA/CERCLA GUIDANCE ON NON-CONTIGUOUS SITES AND ON-SITE MANAGEMENT OF WASTE AND TREATMENT RESIDUE	03/27/86	PORTER, J.W./OSWER	Final	8	2	11 CONTIGUOUS HAZARDOUS WASTE SITES FOR RCRA ACTION	OSWER #9347.0-1
2400	25	CRITERIA FOR IDENTIFYING AREAS OF VULNERABLE HYDROGEOLOGY UNDER RCRA - STATUTORY INTERPRETIVE GUIDANCE [Secondary Reference]	07/01/86	OSWER/OSW	Final	950	2		OSWER #9472.00-3A
2401	24	FINAL RCRA COMPREHENSIVE GROUND-WATER MONITORING EVALUATION (CME) GUIDANCE DOCUMENT [Secondary Reference]	12/19/86	LUCERO, G.A./OWPE	Final	55	2	11 DETERMINATION OF TECHNICAL INADEQUACIES IN GROUND-WATER MONITORING SYSTEMS	OSWER #9950.2
2405	24	OPERATION AND MAINTENANCE INSPECTION GUIDE (RCRA GROUND-WATER MONITORING SYSTEMS) [Secondary Reference]	03/?/88	OSWER/OWPE/RCRA ENFORCEMENT DIVISION	Final	50	2	11 [illegible]	OSWER #9950.3
2407	25	RCRA GROUND-WATER MONITORING TECHNICAL ENFORCEMENT GUIDANCE DOCUMENT (TEGD) [Secondary Reference]	09/01/86	EPA	Final	370	2		OSWER #9950.1
2408	25	RCRA GROUND-WATER MONITORING TECHNICAL ENFORCEMENT GUIDANCE DOCUMENT (TEGD) EXECUTIVE SUMMARY [Secondary Reference]	07/01/87	LUCERO, G.A./OWPE	Final	8	1		OSWER #9950.1-A

-OSWER-
COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

Doc No.	Ref Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
2149	15 RCRA GUIDANCE DOCUMENT: LANDFILL DESIGN LINER SYSTEMS AND FINAL COVER [Secondary Reference]	07/01/82	EPA	Draft	30	2		
9001	32 RCRA/CERCLA DECISIONS MADE ON REMEDY SELECTION [Secondary Reference]	06/24/85	[illegible] & COMPLIANCE BRANCH, OWPE	Final	3	2		
**	Water Quality							
6000	26 ALTERNATE CONCENTRATION LIMIT GUIDANCE PART I: ACL POLICY AND INFORMATION REQUIREMENTS	07/01/87	OSW/WMD	Final	120	2		OSWER #9481.00-6C
6001	26 GUIDANCE DOCUMENT FOR PROVIDING ALTERNATE WATER SUPPLIES	02/01/88	OERR	Final	64	2		OSWER #9355.3-03
6002	26 INTERIM FINAL GUIDANCE ON REMOVAL ACTION LEVELS AT CONTAMINATED DRINKING WATER SITES	10/06/87	OERR/HSCD	Final	9	2		OSWER #9360.1-01
6003	26 QUALITY CRITERIA FOR WATER 1986	05/01/87	OFFICE OF WATER REGULATIONS AND STANDARDS	Final	325	2		EPA/440/5-86-001
2101	16 CARBON ADSORPTION ISOTHERMS FOR TOXIC ORGANICS [Secondary Reference]	04/01/80	DOBBS, R.A. AMERL COHEN, J.M. AMERL	Final	321	2		EPA/600/8-80-023
6005	1 INFORMATION ON DRINKING WATER ACTION LEVELS [Secondary Reference]	04/19/88	FIELDS, JR., T. (OERR/OD)	Final	13	2	13 HEALTH ADVISORIES FROM COMMONLY APPLIED PESTICIDES 23 HEALTH ADVISORY CONTAMINANTS 33 GUIDANCE FOR ENSURING [illegible] ON DRINKING WATER	
**	Risk Assessment							
5000	27 ATSDR HEALTH ASSESSMENTS ON NPL SITES	10/10/86	DEPT. OF HEALTH AND HUMAN SERVICES/ATSDR	Draft	16	2		
5001	27 CHEMICAL, PHYSICAL & BIOLOGICAL PROPERTIES OF COMPOUNDS PRESENT AT HAZARDOUS WASTE SITES	09/27/85	CLEMENT ASSOCIATES, INC.	Final	320	2		OSWER #9850.3
5002	27 FINAL GUIDANCE FOR THE COORDINATION OF ATSDR HEALTH ASSESSMENT ACTIVITIES WITH THE SUPERFUND REMEDIAL PROCESS	05/14/87	PORTER, J.W. (OSWER/OERR) ATSDR	Final	22	2	11 SAME TITLE DATED 6/22/87	OSWER #9285.4-02
5003	27 GUIDELINES FOR CARCINOGEN RISK ASSESSMENT FEDERAL REGISTER SEPTEMBER 24, 1986, p. 33992	09/24/86	EPA	Final	33	2		

2257

INDEX
COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

EDN No.	Vol	Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
5004	27	GUIDELINES FOR EXPOSURE ASSESSMENT FEDERAL REGISTER SEPTEMBER 24 1986 p 34042	09/24/86	EPA	Final	14	2		
5005	27	GUIDELINES FOR HEALTH ASSESSMENT OF SUSPECT DEVELOPMENTAL TOXICANTS FEDERAL REGISTER SEPTEMBER 24 1986 p 34028	09/24/86	EPA	Final	14	2		
5006	27	GUIDELINES FOR MUTAGENICITY RISK ASSESSMENT FEDERAL REGISTER SEPTEMBER 24 p 34006	09/24/86	EPA	Final	8	2		
5007	27	GUIDELINES FOR THE HEALTH RISK ASSESSMENT OF CHEMICAL MIXTURES FEDERAL REGISTER SEPTEMBER 24 1986 p 34014	09/24/86	EPA	Final	13	2		
5008	28+	HEALTH EFFECTS ASSESSMENT DOCUMENTS (58 CHEMICAL PROFILES) VOL 28 ACETONE ARSENIC ASBESTOS BARIUM BENZO(A)PYRENE CADMIUM CARBON TETRACHLORIDE CHLOROBENZENE CHLOROFORM CHLOROMETHANE CHROMIUM COAL TARS COPPER CRESOLS CYANIDE DDT 1,1-DICHLOROETHANE 1,2-DICHLOROETHANE VOL 29 1,1-DICHLOROETHYLENE 1,2-DICHLOROETHYLENE CIS-1,2-DICHLOROETHYLENE ETHYLBENZENE GLYCOL ETHERS HEXACHLOROBENZENE HEXACHLOROBUTADIENE HEXACHLOROCYCLOPENTADIENE HEXAVALENT CHROMIUM IRON (AND COMPOUNDS) LEAD LINDANE MANGANESE (AND COMPOUNDS) MERCURY METHYL ETHYL KETONE METHYLENE CHLORIDE NAPHTHALENE NICKEL PENTACHLOROPHENOL PHENOL PHENANTHRENE VOL 30 POLYCHLORINATED BIPHENYLS (PCBS) POLYCYCLIC AROMATIC HYDROCARBONS (PAHS) PYRENE SELENIUM (AND COMPOUNDS) SILVER SODIUM CYANIDE SULFURIC ACID 2,3,7,8-TETRACHLORODIBENZO-p-DIOXIN 1,1,2,2-TETRACHLOROETHANE TETRACHLOROETHYLENE TOLUENE 1,1,2-TRICHLOROETHANE 1,1,1-TRICHLOROETHANE TRICHLOROETHYLENE 2,4,5-TRICHLOROPHENOL 2,4,6-TRICHLOROPHENOL TRIVALENT CHROMIUM VINYL CHLORIDE XYLENE ZINC (AND COMPOUNDS)	09/01/86	OERR/OHEA/ECAO CINCINNATI	Final	1730	2		EPA/540/1-86/001-058
5009	31	INTEGRATED RISK INFORMATION SYSTEM (IRIS) (A COMPUTER BASED HEALTH RISK INFORMATION SYSTEM AVAILABLE THROUGH E-MAIL: DIRECTIONS ON ACCESS IS INCLUDED)	-	ORD	Final	--	2		

258

-INDEX-

COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

Doc NO	Vol	Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
5010	31	INTERIM POLICY FOR ASSESSING RISKS OF "DIOXINS" OTHER THAN 2 3 7 8 TCDD	01/07/87	- THOMAS L M /EPA	Final	50	2	1) INTERIM PROCEDURES FOR ESTIMATING RISKS ASSOCIATED WITH EXPOSURES TO MIXTURES 10/86	
5011	31	PUBLIC HEALTH RISK EVALUATION DATABASE (PHRED) [USER S MANUAL AND TWO DISKETTES CONTAINING THE DBASEIII PLUS SYSTEM ARE INCLUDED]	09/16/88	- OERR/TOXICS INTEGRATION BRANCH	Final	-	2		
5012	31	ROLE OF ACUTE TOXICITY BIOASSAYS IN THE REMEDIAL ACTION PROCESS AT HAZARDOUS WASTE SITES	08/01/87	- ATHEY L A ET AL /PACIFIC NORTHWEST LABORATORY - MILLER W E /CORVALLIS ENVIRONMENTAL RESEARCH LAB	Final	106	2		EPA/600/8-87/044
5013	31	SUPERFUND EXPOSURE ASSESSMENT MANUAL	04/01/88	- OERR	Final	160	1		OSWER #9285 5-1
5014	31	SUPERFUND PUBLIC HEALTH EVALUATION MANUAL	10/01/86	- OERR - OSWER	Final	500	1		OSWER #9285 4-1
5015	31	TOXICOLOGY HANDBOOK	08/01/85	- LIFE SYSTEMS, INC - TYBURSKI, T E /OWPE	Draft	126	2		OSWER #9850 3
8000	32	ENDANGERMENT ASSESSMENT GUIDANCE [Secondary Reference]	11/22/85	- PORTER J W /OSWER	Final	11	2		OSWER #9850 0-1
**		Cost Analysis							
6000	32	REMEDIAL ACTION COSTING PROCEDURES MANUAL	10/01/87	- JRB ASSOCIATES/CH2M HILL - ORD/HWERL - OSWER/OERR	Final	56	1		
6001	32	REMOVAL COST MANAGEMENT MANUAL	04/01/88	- OSWER/OERR	Final	170	1		OSWER #9360 0-02B
1003	1	ENVIRONMENTAL REVIEW REQUIREMENTS FOR REMOVAL ACTIONS [Secondary Reference]	04/13/87	- OERR/ERD	Final	6	2		OSWER #9318 0-05
**		Community Relations							
7000	32	COMMUNITY RELATIONS IN SUPERFUND A HANDBOOK (INTERIM VERSION)	06/01/88	- OERR	Final	188	2	1) CHAP 6 OF THE COM REL HANDBOOK 11/03/88	OSWER #9230 0-03B

INDEX
COMPENDIUM OF CERCLA RESPONSE SELECTION GUIDANCE DOCUMENTS

Doc No.	Vol	Title	Date	Authors	Status	Pages	Tier	Attachments	OSWER/EPA Number
**		Enforcement							
8000	32	ENDANGERMENT ASSESSMENT GUIDANCE	11/22/85	- PORTER, J W /OSWER	Final	11	2		OSWER #9850 0-.
8001	32	INTERIM GUIDANCE ON POTENTIALLY RESPONSIBLE PARTY PARTICIPATION IN REMEDIAL INVESTIGATIONS AND FEASIBILITY STUDIES	05/16/88	- PORTER, J W /OSWER	Final	37	2		OSWER #9835 1a
**		Selection of Remedy/Decision Documents							
9000	32	INTERIM GUIDANCE ON SUPERFUND SELECTION OF REMEDY	12/24/86	- PORTER, J W /OSWER	Final	10	2		OSWER #9355 0-19
9001	32	RCRA/CERCLA DECISIONS MADE ON REMEDY SELECTION	06/24/85	- KILPATRICK, M /COMPLIANCE BRANCH OWPE	Final	5	2		

DATA ELEMENT DEFINITIONS

The data elements of the Compendium database, as identified on the index, are shown below:

DATA ELEMENT	DEFINITION
Doc No	Unique four-digit number assigned to a document included in the Compendium according to category.
Vol	Volume number of the binder in which the hard copy of the document is contained.
Title	Title of the document. **Secondary Reference** is identified following the title when a document relates to more than one category. The document itself is filed under the number series assigned to its primary category.
Date	The date the document was published by or released from the issuing office or entity.
Authors	Author(s) and affiliation(s). Also includes identification of the EPA Project Officer and issuing office, where applicable.
Status	Indicates the status of a document, either draft or final version.
Pages	Total number of printed pages of the document, including any attachments.
Tier	Tier 1 or Tier 2. Tier 1 documents are the core documents of the Compendium as listed in the pamphlet titled "Selected Technical Guidance for Superfund Projects," compiled by OERR. Tier 2 documents are all other documents included in the Compendium.
Attachments	Attachments to a document by complete or abbreviated title.
OSWER/EPA Number	EPA report or OSWER Directive System numbers, where applicable.

RD/RA NEGOTIATIONS/SETTLEMENT

I. **DESCRIPTION OF ACTIVITY** 1

Introduction 1
Statutory Authority 1
Overview of the Negotiation Process 1
Roles and Responsibilities 3
    RPM Responsibilities 3
    ORC Responsibilities 3
    OWPE Responsibilities 3
    OECM Responsibilities 4
    DOJ Responsibilities 4
Delegations 4

II. **PROCEDURES AND INTERACTIONS** 6

A. Regional Decision to Pursue RD/RA Negotiations 6
    Review PRP Search 6
B. Negotiation Planning 6
    RD/RA Negotiation Plan 6
    Draft Consent Decree 8
        Covenants Not to Sue 8
        Reopeners 9
C. Notification of States and Federal Natural Resources Trustees 9
D. Special Notice Letters 9
    Contents 9
        Cost Recovery 10
    Timing the SNL 11
    Section 122(a) Letters 11
E. Good Faith Offer (GFO) 11
    Negotiation Extensions 12
F. Settlement Incentives/ Disincentives 13
G. CERCLA Settlement Policy 13
H. Settlement Tools 14
    Mixed Funding Settlements 15
        Preauthorization 16
        Mixed Work 18
        Cash Out 18
    De Minimis 19
        Criteria for Eligibility for *De Minimis* Settlements 20
        Necessary Information for Generator *De Minimis* Settlements 20
        Potential *De Minimis* Generator Candidates 20
        Timing *De Minimis* Settlements 21
        Reopeners 21
        Finalizing Settlement 22
    Non-Binding Allocation of Responsibility (NBAR) 22
    Settlement Decision Committee (SDC) 23
    AA Review Team 24

I. Finalizing Settlement 24
Referral Package 24
J. Inducements to Non-Settlors/ Enforcement Options 25
Section 106 AOUs 25
Section 106 Litigation 25
Fund 26
Partial Settlements 26
K. Post Referral Actions by DOJ 26

III. PLANNING AND REPORTING REQUIREMENTS 27

A. Budget Requirements 27
B. Reporting Requirements 27

IV. POTENTIAL PROBLEMS/RESOLUTIONS 30

A. Poor Relationships Among the PRPs 30
B. Multiple Revisions to Draft CD 30
C. Settling with Majors Involved with De Minimis Settlements 30
D. Use of Public Relations 30
E. Inadequate PRP Searches 31
F. Late Challenges to Volumetric Ranking 31

V. REFERENCES 32

Policy 32
Guidance 32
Memoranda 32
Contacts 33
Training 33

VI. ACTIVITIES CHECKLIST 34

APPENDIX

RD/RA NEGOTIATIONS/SETTLEMENT

I. DESCRIPTION OF ACTIVITY

Introduction

This chapter discusses the process of negotiating for PRP conduct of the Remedial Design/Remedial Action (RD/RA) and focuses on the RPM's role in the process. In addition to discussing the RD/RA negotiation process, this chapter also discusses the settlement tools available to EPA and PRPs, including mixed funding, Non-binding Preliminary Allocation of Responsibility (NBARs), de minimis settlements, the settlement decision committee and the Assistant Administrator's review team.

Statutory Authority

Section 122 of CERCLA requires that all RD/RA settlements with PRPs be finalized as judicial consent decrees. Consent decrees usually reference section 106 (Abatement Actions) and section 122 (Settlements). Settlements for RD/RA or RA only are never done administratively as an Administrative Order on Consent (AOC). Settlements for RD only may take the form of AOCs but AOCs for RD activity are not preferred. Settlement with de minimis parties, however, may be finalized as an AOC.

Overview of the Negotiation Process

The RD/RA negotiation process requires cooperation and close coordination of the Regional program office, ORC, DOJ, OECM and OWPE. Exhibit VIII-1 summarizes the RD/RA negotiation process.

The negotiation planning process begins with a Regional decision that there are Potentially Responsible Parties (PRPs) who appear to be viable and capable of properly implementing the remedy and who may be willing to settle. The Region must evaluate the results of the PRP search, which should be complete well in advance of RD/RA negotiations, and other evidence when making this decision.

The first step in the RD/RA negotiation process is for the RPM and Office of Regional Counsel (ORC) staff person to develop an RD/RA negotiation plan outlining the negotiation objectives and strategy. This plan is part of integrated remedial and enforcement planning. As a management device, it will define roles and responsibilities for all participants, establish mutually agreed timelines for performance of individual responsibilities, establish a framework for accountability in tracking progress, and make it possible to obtain commitments from all participants to shared goals and objectives. Key areas where attention should be focused as part of the negotiation planning process are: assuring a timely and high-quality PRP search, including information for special notice and evidence for litigation, assuring that the Administrative Record is in order, documenting past costs, and establishing a substantive negotiating strategy. Settlement devices such as mixed funding and de minimis also may be employed, and PRPs may request that EPA provide an NBAR under section 122(e)(3) of CERCLA.

By this stage, most or all PRPs have been notified of their status as PRPs with a general notice letter. Following general notice, EPA continues to look for more PRPs and for hard evidence of liability. If additional PRPs are identified, EPA issues general notice letters to them, unless notice has been provided by special notice or section 122(a) notice.

The RPM should encourage the new PRPs' involvement in the negotiations and should notify them of any PRP steering committees that may have formed.

The RPM should contact the Federal natural resources trustees again (earlier contact will have occurred prior to the RD/RA negotiation planning process) when developing the negotiation plan to assure their input to the plan. Coordination with the State is important when developing the RD/RA negotiation plan to assure that their concerns are understood and to determine the availability of State funding should negotiations fail to produce a settlement.

A pre-referral package should be submitted to the Department of Justice (DOJ) before the commencement of the formal settlement process to ensure timely involvement and coordination with DOJ. Generally, notice to DOJ should be provided at least 60 days prior to the issuance of the RD/RA special notice.

The formal settlement process begins with the issuance of special notice letters to the PRPs. Special notice letters are authorized by CERCLA when EPA determines that a period of negotiation would facilitate an agreement with PRPs for taking response action. Issuance of special notice should occur between the time the proposed plan and draft feasibility study are released to the public and the date the ROD is signed, or very shortly thereafter. Exceptions to this are discussed later in this chapter. A draft consent decree (approved by appropriate EPA and DOJ management) and proposed plan or ROD should be attached to the special notice letter.

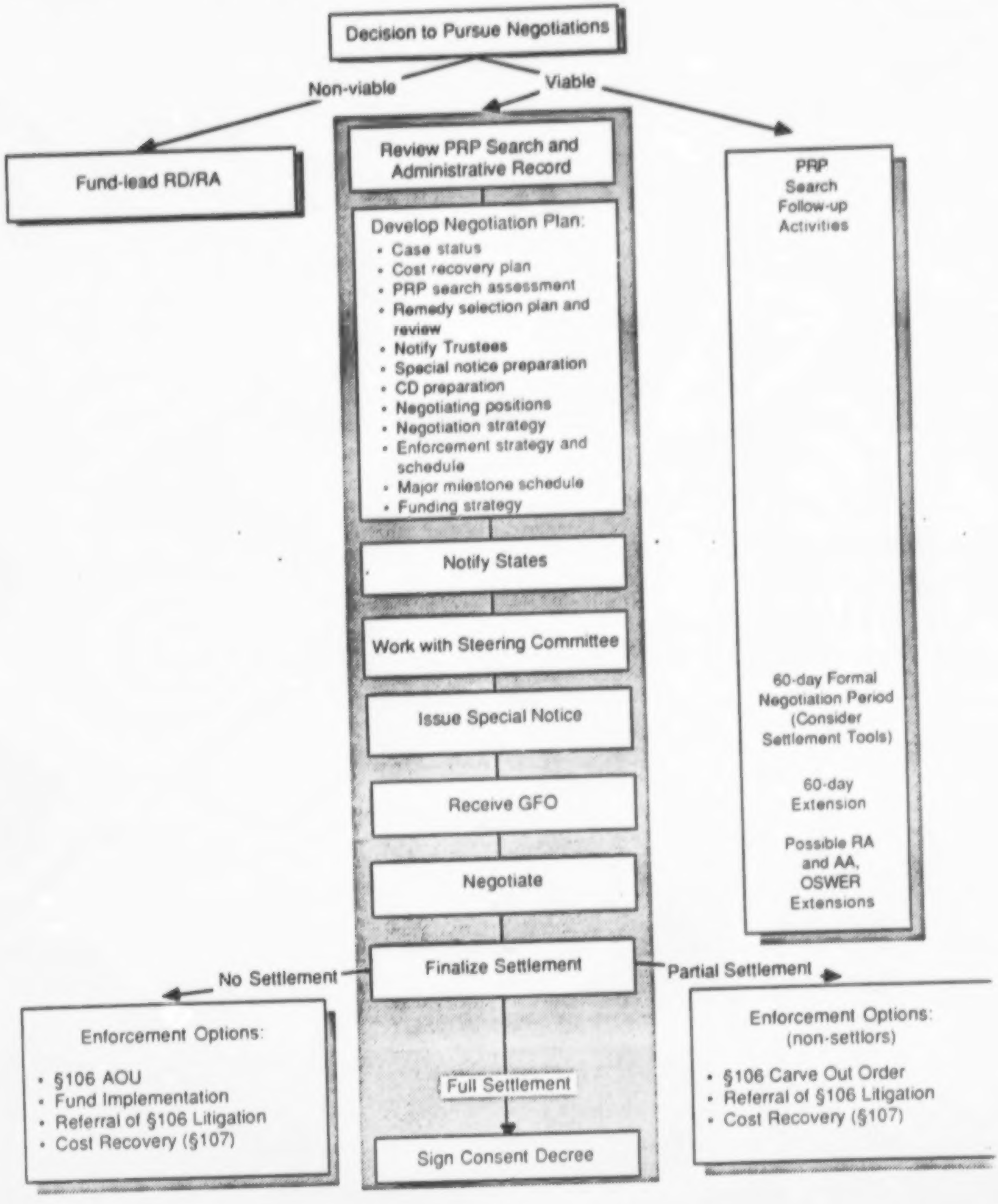
With certain exceptions, the issuance of the special notice letter begins a 60-day moratorium period regarding action under section 104 and 106 of CERCLA. PRPs have 60 days from the date of issuance to submit a good faith offer to EPA. If such an offer is received, the moratorium is extended an additional 60 days. If additional time is necessary, the Regional Administrator may extend the moratorium period by an additional 30 days. Requests for extensions of RD/RA negotiations beyond 150 days must be well justified and must be approved in advance by the AA, OSWER.

Once agreement has been reached, the PRPs and the Regional Administrator must sign a consent decree. Thereafter, the consent decree is forwarded to DOJ with a referral package developed by ORC. If the settlement falls under any of the categories of non-delegated settlements, OECM and OWPE must concur on the signed consent decree before it is forwarded to DOJ. It should be noted that RD-only settlements may be in the form of an administrative order on consent or stipulation and can be used to expedite the initiation of response work. EPA does not encourage RD-only settlements without an expectation that the PRPs will agree to commit to conduct the remedy.

Should EPA fail to reach an agreement with the PRPs, Regions may issue a unilateral administrative order, which may be followed by a judicial action (referral to DOJ), and/or initiate Fund-financed activity. Referrals to DOJ for RD/RA are usually under the authority of section 106 of CERCLA. Regions provide litigation support for the case after it is filed in court by DOJ.

Exhibit VIII-1

RD/RA Negotiation Process


Decision to Pursue Negotiations
Non-viable
Viable
Fund-lead RD/RA
Review PRP Search and Administrative Record
Develop Negotiation Plan:
• Case status
• Cost recovery plan
• PRP search assessment
• Remedy selection plan and review
• Notify Trustees
• Special notice preparation
• CD preparation
• Negotiating positions
• Negotiation strategy
• Enforcement strategy and schedule
• Major milestone schedule
• Funding strategy
Notify States
Work with Steering Committee
Issue Special Notice
Receive GFO
Negotiate
Finalize Settlement
No Settlement
Partial Settlement
Full Settlement
Sign Consent Decree
PRP Search Follow-up Activities
60-day Formal Negotiation Period (Consider Settlement Tools)
60-day Extension
Possible RA and AA, OSWER Extensions
Enforcement Options:
• §106 AOU
• Fund Implementation
• Referral of §106 Litigation
• Cost Recovery (§107)
Enforcement Options: (non-settlors)
• §106 Carve Out Order
• Referral of §106 Litigation
• Cost Recovery (§107)

Roles and Responsibilities

This section describes the roles and responsibilities of the RPMs, assistant Regional counsel, and representatives from OWPE, OECM, and DOJ. The primary activities for each group are summarized for each phase of the negotiation process below and in Exhibit VIII-2.

RPM Responsibilities

The RPM plays a central role throughout the RD/RA negotiation process. The RPM is responsible for technical aspects of the case and for coordinating with OWPE during each phase of the negotiations. Planning, preparing for, and participating in the negotiations process, along with having responsibility for negotiation coordination, usually involves a substantial time commitment by the RPM over a long period of time.

The planning stage is based on a thorough and complete PRP search. RPMs usually will have given the PRPs early notice of their potential liability through general notice letters. Information on volumetric rankings of PRPs and the nature of substances at the site is contained in an RI/FS special notice. The RPM ensures that the PRP search has been updated as appropriate and that special notice for RD/RA is prepared. The RPM also is responsible for preparation of a negotiation strategy, in conjunction with the assistant Regional counsel. In view of the intense efforts required to prepare the proposed plan, responsiveness summary and ROD, as much of this work as possible should be done before the proposed plan is prepared. The RPM assists in developing the consent decree by drafting the technical aspects of the document. The RPM also participates in developing the case referral packages for section 106 and section 107 litigation cases.

ORC Responsibilities

ORC, in partnership with the RPM, plays a central role in all phases of the RD/RA negotiations. The assistant Regional counsel's primary role is to prepare the pre-referral report to DOJ and the draft consent decree, and to provide legal assessments during the negotiation process. ORC is responsible for coordinating with DOJ and OECM during the RD/RA negotiations. The assistant Regional counsel also participates in the development of the case referral package for DOJ litigation of section 106 and section 107 cases.

OWPE Responsibilities

OWPE is responsible for ensuring national consistency for negotiated settlements and consistency with Agency policy. OWPE has experts on each type of RD/RA settlement (e.g., mixed funding, and de minimis) who act as resources for the RPM and assistant Regional counsel.

OWPE participates in management review of non-delegated settlements, and the Director, OWPE must concur on these settlements. Additionally, OWPE representatives may participate on negotiation teams where complex or nationally significant issues are anticipated. OWPE may also assist the Regions in assembling part of the cost documentation package. OWPE should be on the case correspondence list and be supplied with relevant documents, including draft consent decrees, relating to cases in RD/RA negotiations. The Director, OWPE also chairs the Settlement Decision Committee (SDC) which is discussed later in this chapter and in Chapter V, RI/FS Negotiations.

OECM Responsibilities

OECM is responsible for ensuring that negotiated settlements are consistent across the Regions with national policy for legal matters. OECM attorneys have expertise in the legal implications of RD/RA settlements. OECM attorneys may participate in any negotiations where complex or nationally significant issues are anticipated, assist Regional counsel in prereferral matters, and review referrals sent to DOJ. OECM also reviews all consent decrees resulting from settlements. For non-delegated settlements, the AA, OECM must concur. Whether or not the settlement is delegated, OECM should be on the case correspondence list and be supplied with relevant documents and draft CDs. In addition, OECM is represented on the SDC.

DOJ Responsibilities

DOJ's representative from the Land and Natural Resources Division's Environmental Enforcement Section is EPA's attorney for litigation of Superfund cases DOJ participates fully in negotiations, litigation, and enforcement strategy development. DOJ representatives participate on the negotiations team. The DOJ attorney represents DOJ views on the case and is responsible for providing consistency with and insight into other enforcement cases. The attorney also provides analysis of the litigative risks of going to trial. DOJ concurrence is required for all RD/RA or RA consent decrees and for cost recovery or de minimis administrative orders where total site response costs exceed $500,000. The DOJ attorney and appropriate management review the initial draft of the consent decree before it is sent to the PRPs, as well as subsequent redrafts. DOJ case attorneys are important legal resources for the RPM and assistant Regional counsel. Close coordination and communication with DOJ is important for successful negotiation and litigation of Superfund cases.

Delegations

Headquarters has delegated authority to the Regional Administrators for RD/RA settlements under the following conditions:

- With no Headquarters concurrence or consultation required if the settlement is a:
    - Section 106 or 106/107 RD/RA settlement where response costs do not exceed $30 million and the settlement is not in a category summarized below.
- With Headquarters consultation required:
    - Section 106 or 106/107 RD/RA settlements where response costs are between $30 and $60 million
    - Settlements that compromise greater than 25 percent and less than 50 percent of total past and future costs
    - Mixed funding settlements that compromise between 25 and 50 percent of response costs where the EPA obligation is greater than $2 million.
- Upon attainment of experience by the Region (i.e., Headquarters concurrence retained on the first settlement):
    - De minimis settlements

Exhibit VIII-2

Roles and Responsibilities

RPM

NEGOTIATIONS PLANNING

- Ensure PRP search review and follow up by civil investigator and ORC
- Send GNL, if necessary
- Coordinate updated information exchange with the PRPs, including §104(e) letters and providing the PRPs with information regarding other PRPs (in conjunction with assistant Regional counsel)
- Assemble cost documentation
- Assist in preparation of negotiation plan and pre-referral litigation report
- Review Administrative Record
- Draft technical provisions of consent decree
- Develop remedial action plan (in conjunction with specialized technical teams (e.g., ground water, treatment, design) or contractors
- Notify State and trustees

INFORMAL AND FORMAL NEGOTIATIONS

- Send Special Notice Letters (SNL)
- Conduct negotiations as lead technical representative on the case team
- Maintain coordination between appropriate Headquarters and State and Natural Resources Trustee offices
- Manage against time lines
  - Request extensions for negotiations from Regional Administrator/Headquarters
- Obligate funds from the Trust Fund if appropriate

ORC

NEGOTIATIONS PLANNING

- Review strength of evidence of PRP liability
- Assist in preparation of the RD/RA negotiation plan and preferral litigation report
- Review draft ROD and Administrative Record
- Draft initial consent decree
- Notify DOJ of the negotiations

INFORMAL AND FORMAL NEGOTIATIONS

- Draft EPA's negotiation strategy
- Review the SNL
- Conduct negotiations as the lead legal representative
- Redraft consent decree with changes resulting from negotiations
- Coordinate with the State legal representative.

    - Mixed funding settlements.

- With Headquarters concurrence retained; delegation to Region to be reviewed in the future:

    - Section 106 RD/RA settlements where response costs exceed $60 million
    - Section 107 settlements where total past and future costs exceed $60 million
    - Settlements that compromise greater than 50 percent of the total past and future costs, and mixed funding settlements that require 50 percent or more of total past and future costs or greater than a $2 million contribution by the U.S.
    - Multi-Regional or nationally-managed cases, including bankruptcies
    - Settlements based upon extraordinary circumstances that purport to grant covenants not to sue without limitations as to future liability (section 122(f)(6)(B))
    - Precedent setting cases (e.g., certain municipalities as generators, dioxin, substantial deviations from Agency policy)
    - Settlements involving section 122(f)(2) special covenants not to sue.

For further information on Regional authority, consult OSWER Directive 9012.10-a, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13 B and 14-14 E (June 17, 1988).

References

OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 12, 1988).

OSWER Directive 9834.3, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).

OECM, "CERCLA RD/RA Settlement Negotiations Checklist" (January 26, 1988).

II. PROCEDURES AND INTERACTIONS

A. *Regional Decision to Pursue RD/RA Negotiations*

The Regional decision to pursue RD/RA negotiations must be planned in the prior-year SCAP commitments to allow the Agency to define the resource needs for the Region. Regions should use the annual SCAP process and quarterly updates to identify those sites that are likely to progress to RD/RA negotiations in the current fiscal year and the planned fiscal year. Sites where RODs are expected are considered the initial pool of prospects for RD/RA negotiations.

The RPM and assistant Regional counsel are the lead technical and legal negotiators, respectively, on the negotiation or case team. In addition, the RPM is usually responsible for developing a budget estimate of post-RI/FS support needs during RD/RA negotiations. The Regional CERCLA section chief and case team have responsibility for notifying Federal natural resources trustees, States, DOJ, OWPE, OECM, and the relevant technical support personnel of the Region's intent to pursue RD/RA negotiations in the planned fiscal year. The decision to conduct RD/RA negotiations should be entered as a planned SCAP target.

Review PRP Search

During the RI/FS, and well prior to initiation of negotiations for PRP conduct of RD/RA activities, the negotiation team should review the results of PRP search activities at the site and identify follow-up activities that may lead to identification of additional PRPs or improved evidence about the volume, substances, liability, or financial viability relating to previously identified PRPs. The potential role of newly identified PRPs should be considered in developing the negotiation plan.

B. *Negotiation Planning*

Negotiations where EPA is fully prepared and sets schedules and deadlines are much more likely to result in a signed consent decree than negotiations for which EPA has not adequately planned. A suggested RD/RA negotiation planning schedule is presented in Exhibit VIII-3. The essential elements of negotiation planning are discussed below.

RD/RA Negotiation Plan

The RD/RA negotiation plan is one major component of the site management plan, as described in Chapter III, Comprehensive Site Planning. The object of the plan is to assist the RPM in effective management of the RD/RA negotiation process and increase the likelihood of achieving PRP settlements for RD/RA. The detailed RD/RA negotiation plan, in combination with the site overview and other existing components of the site management plan (PRP search plan, RI/FS negotiation plan) also should comprise the pre-negotiation mini-litigation report.

The RPM and assistant Regional counsel should prepare an RD/RA negotiation plan that outlines the negotiation objectives and strategy. The RD/RA negotiation plan is a vehicle to assist in planning specific goals and objectives for the negotiations. The plan should address, at a minimum, the following topics:

- Brief update of case status, including current status of site response activities, site enforcement activities, and their relation to overall site objectives.

Exhibit VIII-3

Sample RD/RA Negotiation Planning Schedule

Activity	Schedule With Respect To Planned Negotiation Start Date
PRP Search Assessment	Initiate at least 3 quarters prior to start date to allow for supplemental activities. Conclude supplemental activities no later than 5 months before start date.
Request cost-recovery documentation	Complete checklist 2 quarters prior to start date.
Decision to pursue negotiations	At least 4 months prior to start date.
Final PRP search evaluation	
Evaluate schedule in terms of SPMS commitments and construction season	
Assess cost recovery case	
Develop negotiation plan	At least 3-1/2 months prior to start date.
Implement negotiation plan	Initiate at least 1 quarter prior to start date.

- PRP search assessment, including assessment of completeness (identification of all PRPs; information on volume/nature of substances from each PRP), tracking systems, strength of evidence, financial viability of PRPs, liability theories, and PRP defenses.

- Cost Recovery, including plan for updating documentation and recovery of past costs to date and estimates of future oversight costs, an assessment of Statute of Limitiations (SOL) issues, computation of interest claims, demand for past costs in special notice or demand letter, assessment of any weaknesses in past costs, relationship of past costs to overall settlement, and litigation alternatives for costs if non-settlors exist or negotiations are unsuccessful.

- Remedy selection plan and review of Administrative Record, including identification of participants in RI/FS and ROD preparation, and if the ROD is not signed, detailed timeline for ROD preparation, public participation (including PRPs) in the remedy selection process, review of Administrative Record, and overall coordination with enforcement case development and negotiations.

- Special notice letter preparation and review (with volumetric attachment).

- Consent decree preparation and review, including technical deliverables and schedules.

- Plan for negotiation positions and for obtaining approval for negotiations and overall tactics to achieve these objectives. Review of volumetric shares, nonviable parties, strength of evidence, appropriateness of de minimis and/or need for mixed funding, and criteria for evaluating good faith offers. Possible re-examination of positions if there are some settlors and some viable non-settlors.

- Procedural strategy for carrying out negotiations, including discussions with steering committee, timing of special notice, drop dead dates, draft consent decrees, development of work plans, oversight plan, and associated response needs.

- Enforcement strategy and schedule for actions should negotiations not result in a settlement in a reasonably prompt fashion. These may include section 106 AOs or judicial actions.

- Funding strategy (RD and RA may be separate) and schedule if case does not settle, including an analysis of State share issues.

- Schedule for major milestones with specific case team assignments for managing and performing task accomplishments.

- Resource needs.

The RD/RA negotiation plan is also discussed in Chapter III, Comprehensive Site Planning.

Draft Consent Decree

The terms and conditions governing the RD/RA activities of PRPs are specified in a Consent Decree (CD). The case team should prepare a draft CD as part of the negotiations planning activities. OECM currently is preparing a model CERCLA CD. Exhibit VIII-4 presents the typical elements of a CD. The concurrence of appropriate EPA and DOJ management on the draft decree should be obtained before it is sent to the State or the PRPs.

The following is a more detailed discussion of two specific elements of CDs--covenants not to sue and reopeners. These are two frequently disputed provisions in RD/RA settlements in which the RPM may not have had prior training.

Covenants Not to Sue

Under section 122(f)(1), EPA may grant covenants not to sue (covenants) for both present and future liability to settling PRPs. In general, present liability refers to the PRPs' obligation to pay response costs already incurred by the Agency and to complete those remedial activities set forth in the ROD. Future liability refers to the PRPs' obligation to perform any additional response activities that are necessary to protect human health or the environment that arise after the ROD is signed.

Generally, PRPs do not receive broad covenants not to sue (which sometimes are referred to as releases from liability). PRPs will be released from past costs if they pay them or, depending on the provisions of the settlement, may be released if past costs are deferred to non-settlors. Under most RD/RA consent decrees, PRPs are liable for implementation of the ROD, O&M, and oversight, and a covenant not to sue becomes effective for these when the response is completed. They remain liable for future work, such as might be required by the CERCLA section 121(c) five-year review.

Assuming CERCLA section 122 (f)(1) conditions are met, EPA must provide covenants not to sue in two special cases:

- If EPA selects a remedial action involving off-site disposal after rejecting a PRP proposal to conduct an on-site remedy that fully complies with the NCP requirements.
- If the remedy involves treatment of hazardous substances and treatment of by-products that destroy, eliminate, or permanently immobilize each of the substances such that, in the judgment of EPA, neither the substances nor the byproduct of treatment present any current or future significant risk. Examples of such treatment technologies may include biodegradation and incineration.

Special covenants not to sue without reopeners may also be provided for in extraordinary circumstances, which are limited. Only the natural resource trustee may authorize covenants not to sue for natural resource damages.

Covenants not to sue for present liability take effect upon certification that the remedial action has been completed in accordance with the terms of the ROD and in a manner

274

Exhibit VIII-4

Examples of Provisions in a Consent Decree

I. Background

II. Jurisdiction

III. Parties Bound

IV. Definitions

V. General Provisions

VI. Performance of the Work by Settling Defendants

VII. EPA Periodic Review to Assure Protection of Human Health and Environment (§121(c))

VIII. Failure to Attain Performance Standards/Additional Work

IX. Quality Assurance, Sampling, and Data Analysis

X. Access

XI. Reporting Requirements

XII. Submissions Requiring Agency Approval

XIII. Remedial Project Manager/Project Coordinators

XIV. Assurance of Ability to Complete Work

XV. Trust Fund

XVI. Certification of Completion

XVII. Endangerment and Emergency Response

XVIII. Reimbursement of Response Costs and Oversight Costs

XIX. Indemnification and Insurance

XX. Force Majeure

XXI. Dispute Resolution

XXII. Stipulated Penalties

XXIII. Covenants Not to Sue by Plaintiffs

Exhibit VIII-4(2)

Examples of Provisions in a Consent Decree

XXIV. Covenants by Settling Defendants

XXV. Access to Information

XXVI. Retention of Records

XXVII. Notices and Submissions

XXVIII. Effective and Termination Dates

XXIX. Retention of Jurisdiction

XXX. Modification

XXXI. Community Relations

XXXII Waiver of Service of Complaint

XXXIII. Lodging and Opportunity for Public Comment

XXXIV. Signatories

consistent with the NCP. Chapter XI, Site Completion/Deletion, contains more detailed information on certifying the completion of remedial activity at a site. For further information on covenants not to sue and model covenants, consult OSWER Directive 9834.8, "Covenants Not To Sue Under SARA" (July 10, 1987).

Reopeners

Reopener provisions allow EPA to hold the PRP liable for additional response costs incurred at the site due to unknown conditions or information or failure of the remedy. Reopener provisions must be included in every consent decree to cover the following situations:

- Where conditions unknown at the time of the CD reveal that the remedy is no longer protective of public health or the environment.
- Where the remedy fails to be protective of human health and the environment.

In both cases, the operative principle is the development of new scientific information that shows that the site presents a problem not addressed satisfactorily by the remedy. This does not mean that the development of new remedial technologies is a basis for reopeners. Further information on reopeners can be found in OSWER Directive 9834.8, "Covenants Not to Sue Under SARA" (July 10, 1987).

C. Notification of States and Federal Natural Resources Trustees

Section 121(f)(1) of CERCLA provides for notice to the State of negotiations. In addition, section 122(j)(1) requires that if a release or threat of release at a site may have resulted in damages to natural resources, EPA must notify the appropriate Federal or State trustees and provide them with an opportunity to participate in the negotiations. The RPM is responsible for notifying the State and both the Federal and State trustees. Settlements that specifically provide for remediation of natural resource damages, or determine that there were no such damages and grant a covenant not to sue, must be made with the agreement of the appropriate trustee. Resolution of these issues is often important to PRPs who may decline to sign a decree without resolution. For further information on notification procedures and negotiation interactions with Federal and State trustees, refer to Chapter V, RI/FS Negotiations/Settlement.

D. Special Notice Letters

Section 122 of SARA authorizes EPA to issue special notice letters (SNLs) to begin a formal negotiation period with the PRPs. The primary purposes of the special notice procedures are to facilitate settlements for RD/RA through direct negotiations with PRPs and to expedite cleanups. Prior to issuance of the SNL for RD/RA, PRPs should have been provided information on all PRPs' involvement at the site, should have coalesced, and should be familiar with the remedial investigation and the remedial alternatives.

Contents

The SNL should contain the following information:

- Notice of the potential liability of the PRP

- The purpose of the SNL and the conditions of the negotiations moratorium
- Description of future response actions, if known
- Description of the elements of a good faith offer
- Statement of work to be performed
- Additional information, including information on other PRPs, fact sheets on the site, volumetric ranking of substances at the facility, and a list of the volume and nature of substances contributed by each PRP
- Demand for payment of past costs
- The date when a good faith offer is due.

The SNL should include as attachments a copy of EPA's proposed plan or the ROD, if signed, a draft consent decree for the RD/RA, and a draft RD/RA statement of work.

To the extent possible, the SNL should contain specific information to assist the PRPs in developing a good faith offer. This includes information stipulating the minimum elements of an acceptable good faith offer and what the Region will not accept. Minimum requirements for GFOs are discussed later in this chapter.

Headquarters has developed model special notice letters (OSWER Directive Number 9834.10A, "Model Notice Letters," Feburary 7, 1989) which most Regions have tailored to their own use.

The ORC should notify the Chief of the Environmental Enforcement Section at DOJ and provide a pre-referral report 60 days prior to issuing SNLs where settlement by consent decree is anticipated. A copy of this notification should be sent to OECM and OWPE. The memorandum should include information about when the SNL will be sent and include the draft CD for DOJ review. The draft CD also should be made available for OECM and OWPE review, especially if it is anticipated that the settlement will require Headquarters consultation or concurrence.

Copies of the SNL should be sent to the appropriate State representative, the natural resource trustees, the Regional Administrative Record coordinator and OWPE (unless the Region has previously provided a copy of a general notice letter with the particular PRP as a recipient. OWPE will enter the PRP into the Superfund Enforcement Tracking System (SETS).

Cost Recovery

The negotiations should include negotiations for any past costs, such as costs of a removal or Fund-lead RI/FS. RPMs should refer to Chapter XII, Cost Recovery, for information on the different types of costs, which include indirect, direct, pre- and post-SARA, interest, and the required documentation for recovering these costs. The RPM needs to request cost documentation from the Financial Management Division (FMD) at least 90 days in advance of issuing the SNL. Once this documentation is received, the RPM should provide it to the PRPs so that they will have EPA's cost information available to them.

Timing the SNL

The SNL should be sent between the time the draft proposed plan and feasibility study are released for public comment and when the ROD is issued. The timing strategy will strike a balance between EPA's ability to conduct meaningful negotiations and minimize delay in implementing the RD/RA. It is not appropriate to delay issuance of SNL for months after the ROD. The negotiation schedule should take into account any obligation of Fund monies for RD/RA activity at the site.

Furthermore, negotiations must be conducted in a way that does not undermine the public participation process. Since the proposed plan has been released, the PRPs will be able to incorporate the possible range of remedial alternatives into the good faith offer.

Section 122(a) Letters

If EPA decides not to use the special notice procedure, the RPM must send a letter to PRPs in accordance with section 122(a) of CERCLA stating why EPA has decided to forego the formal negotiations period. Situations where it would not be appropriate to use the special notice procedures because it would not facilitate agreement or expedite cleanup, may include those where:

- Past dealings with the PRPs indicate that they are unlikely to negotiate a settlement
- EPA believes the PRPs have not been negotiating in good faith
- No PRPs have been identified in a PRP search reviewed by the civil investigator and assistant Regional counsel
- PRPs lack the resources to conduct response activities
- There are ongoing negotiations with deadlines specified in a letter (i.e., ongoing cases where negotiations would not be further expedited by the SNL process).

If additional PRPs are identified after the issuance of SNLs, the RPM may include them in ongoing negotiations or if there is a partial settlement, negotiate a separate agreement. This is a case-by-case decision. SNLs may be sent for a single operable unit or for the entire RD/RA, depending on the remedy documented in the ROD and Regional policy. Guidance on special notice letters is contained in OSWER Directives 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987) and 9834.10A, "Model Notice Letters" (February 7, 1989).

E Good Faith Offer (GFO)

PRPs are usually given 60 days from the special notice to provide the Agency a good faith proposal for implementation of the RD/RA. The following list of minimum requirements for good faith offers should be used to help maintain national consistency:

- A statement of the PRP's willingness to conduct or finance the RD/RA that is consistent with EPA's proposed plan or the ROD, if it has been issued, or that provides a legitimate basis for further discussion. While a proposal with variations on EPA's chosen/preferred remedy does not always mean that an offer is in bad faith, it is at the very least not preferred. If, as a matter of course, EPA frequently reopens remedy discussions there will be fruitless negotiations and undue delays.
- A paragraph-by-paragraph response to EPA's draft consent decree
- A demonstration of the PRP's technical and financial capability to perform the work, including a list of potential contractors and their qualifications
- A statement of the PRP's ability and willingness to reimburse EPA for past response (or if not, why referral to non-settlors is appropriate) and oversight costs
- A discussion of the PRP's position on release from liability and reopeners to liability.

To encourage PRPs to submit acceptable good faith offers, the RPM must take an active role in educating the PRPs. Regional minimum requirements for good faith offers should be stipulated in detail in the special notice letters. The RPM should maintain frequent contact with the PRPs or steering committee representatives regarding development of a good faith offer. The final report and work products of the Settlement Incentives/Disincentives Workgroup may provide guidance to RPMs on evaluating a GFO and proceeding to settlement.

For further guidance on good faith offers, refer to OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987), and OSWER Directive 9834.10A, "Model Notice Letters" (February 7, 1989).

Negotiation Extensions

Issuance of the SNLs triggers a moratorium on EPA's conduct of certain actions. The intent of the moratorium period is to place a statutory deadline on the formal negotiation period to encourage settlement. The initial negotiation moratorium may last for a total of 120 days in RD/RA negotiations. If EPA does not receive a good faith offer within the first 60 days of the SNL, the negotiation period will terminate. If a good faith offer is received, the negotiations may continue for another 60 days. Firm schedules tend to force issues to resolution. Negotiations may be extended for 30 days with Regional Administrator approval and additional extensions may be granted with AA, OSWER approval.

For further information on extensions refer to OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987) and OSWER Directive 9835.4, "Interim Guidance on Streamlining the CERCLA Settlement Process" (February 12, 1987).

F. *Settlement Incentives/ Disincentives*

The settlements incentives/disincentives concept is an approach to RD/RA settlements that indicates EPA's willingess to enter into partial settlements with those willing to settle, particularly if they will conduct the cleanup, and EPA's willingness to pursue viable non-settlors for the remainder. The concept does not apply to single owner-operator sites.

The settlements incentives/disincentives concept continues EPA's goal of recovering 100 percent of site costs and preference for pressing for a close-to-100 percent settlement with some or all PRPs. Nonetheless, in some multi-party cases where most viable PRPs are willing to settle but some are not, as an incentive to those willing to settle EPA may enter into a partial settlement with the willing parties, and pursue the remaining parties for the remainder of the site costs. In determining how much the settlors should pay, the interim CERCLA settlement policy should be applied. At a minimum, the settlors usually should pay more than their volumetric share to take into account non-viable non-settlors and evidentiary deficiencies regarding viable non-settlors. Also, mixed funding and de minimis settlements and NBARs should be used in appropriate cases.

The settlement incentives/disincentives approach also recognizes the use of disincentives to the use of dilatory tactics in negotiation, and to the refusal of all or some PRPs to settle. Section 106 unilateral orders are a powerful management tool to encourage parties that are somewhat willing to settle but are delaying resolution of negotiations. More generally, section 106 unilateral orders are also a disincentive to non-settlement because failure to comply with them may result in penalties under section 106 or treble damages under section 107. Where there is a partial settlement, it is very important to file a lawsuit against non-settlors as soon as possible. In most cases, this is a cost recovery action.

G. *CERCLA Settlement Policy*

EPA's interim CERCLA settlement policy sets forth general principles governing settlements with private parties under CERCLA. The policy recognizes that the objective of negotiations is to collect 100 percent of cleanup costs from responsible parties. The policy also recognizes that in very limited circumstances exceptions to this goal may be appropriate, and establishes criteria for determining where such exceptions are allowed. The ten criteria are:

1. Volume of Wastes Contributed to Site by Each PRP. The volume of waste may contribute significantly and directly to the distribution of contamination on the surface and subsurface ground water. At many sites, there will be wastes for which PRPs cannot be identified. If identified, PRPs may be unable to provide funds for cleanup. The volume of wastes is not the only criterion to be considered. Therefore, it will be necessary in many cases to require a settlement contribution greater than the percentage of wastes contributed by each PRP to the site.

2 Nature of Wastes Contributed. If a waste contributed by one or more of the parties offering a settlement disproportionately increases the cost of cleanup at the site, it may be appropriate for parties contributing such waste to bear a larger percentage of cleanup costs than would be the case using a solely volumetric basis.

3. Strength of Evidence Tracing the Wastes at the Site to the Settling Parties. Where the quality and quantity of the Government's evidence appears to be strong for establishing the PRP's liability, the Government should rely on the strength of its evidence and not decrease the settlement value of its case. If the Government's evidence against a particular PRP is weak, that weakness should be weighed in evaluating a settlement offer from that PRP.

4. Ability of the Settling Parties to Pay. The evaluation of the settlement proposal should discuss the financial condition of the party, and the practical results of pursuing a party for more than the Government can hope to actually recover.

5. Litigative Risks in Proceeding to Trial, including:

   a. Admissibility of the Government's evidence
   b. Adequacy of the Government's evidence
   c. Availability of defenses.

6. Public Interest Considerations. For example, if the State cannot fund its portion of a Fund-financed cleanup, a private-party cleanup proposal may be given more favorable consideration than one received in a case where the State can fund its portion of cleanup costs. Public interest concerns may be used to justify a settlement of less than 100 percent only when there is a demonstrated need for a quick remedy to protect public health or the environment.

7. Precedential Value.

8. Value of Obtaining a Present Sum Certain. The sum offered in settlement may be, in reality, higher than the amount the Government can expect to obtain at trial.

9. Inequities and Aggravating Factors.

10. Nature of the Case that Remains After Settlement. All settlement evaluations should address the nature of the case that remains if the settlement is accepted. For example, if there are no financially viable, liable parties left to proceed against for the balance of the cleanup after the settlement, the settlement offer should constitute everything the Government expects to obtain at that site.

H. Settlement Tools

The negotiation team has several important settlement tools that can help achieve PRP settlements. These include:

- Mixed funding
- *De minimis*

282

- NBARs
- Settlement Decision Committee (SDC)
- AA Review Team.

Each of these settlement tools is discussed in detail in this section.

Mixed Funding Settlements

Mixed funding agreements are settlements whereby EPA settles with fewer than all PRPs for less than 100 percent of the response costs and there are additional measures to assure that the response action is done. There are three types of mixed funding settlements:

- **Preauthorization**: Settling PRPs agree to conduct the response action and the Agency agrees to pay for part of the response costs by approving in advance the basic elements of a claim by settling PRPs against the Fund.
- **Mixed Work**: PRPs conduct discrete parts of the response activity while EPA conducts the remainder.
- **Cash Outs**: Settling PRPs pay a portion of the response costs and the Agency conducts the response action.

Once the PRPs have indicated their interest in pursuing a mixed funding settlement, the Region should evaluate the case against the ten-point settlement criteria which include, in this context, the following:

- The PRPs are in general agreement with the remedy
- A substantial part of cleanup (> 50 percent) is offered by settling PRPs
- The settlors' part of the cleanup is proportionate to or greater than a combined allocation of the settling PRP's
- Strength of liability case against and viability of the PRPs (settlors and non-settlors)
- Amount of waste contributed to the site by settlors and viable non-settlors compared to their relative settlement share
- Other options are available if settlement fails.

The **best candidates** for mixed funding are cases in which the following features are present:

- The potential portion or operable unit to be covered by the Fund is small, or the settling PRPs offer a substantial portion of the total cost of cleanup. In this context, substantial portion may be defined as a commitment by the PRPs to undertake or finance a predominant portion of the total remedial action.

- The Government has a strong case against financially viable non-settling PRPs, from which the Fund portion may be recovered.

Cases considered **poor candidates** for mixed funding have the following features:

- The potential Fund portion is large (e.g., the potentially-settling parties' offer is insufficient).

- The case against settling parties is strong and the case against the non-settlors is not strong, and thus litigation is likely to be more successful.

These factors do not automatically preclude mixed funding for a case. However, for mixed funding to be seriously considered in such instances, other compensating factors must be present, such as the ability of the settlors to initiate the response action more quickly than the Government in a Fund-financed action. The following sections discuss the three types of mixed funding settlements and factors to be considered in choosing a particular type of mixed funding settlement.

After the Region completes an evaluation of the case and determines that it is a good candidate for mixed funding, the RPM notifies OERR (if Fund dollars are involved, as in preauthorization), OWPE, OECM, and DOJ. Specific reporting and tracking information concerning the site is also entered into CERCLIS.

When developing cost allocations for mixed funding settlement proposals, the case team should carefully evaluate the governmental contribution to the cleanup or outstanding work and the strength of the case against non-settlors, including an analysis of liability, viability, and amount contributed to the site. The case team should be careful to avoid a proposal with fixed division of costs between the settlors and the Government. This may result in "over-subscription," where all PRPs or more PRPs than anticipated accept EPA's proposed cost allocation. This could leave EPA with too small a settlement and too few viable or liable non-settlors left including an action where the non-settlors share would be grossly disproportionate to their contributions. To avoid "over-subscription" the case team should develop a sliding scale settlement proposal, where settlement amounts vary depending on the volumetric percentage of PRPs signing on as settlors. The work products of the Settlement Incentives/Disincentives Workgroup contain further information on developing cost allocations for mixed funding settlements.

Preauthorization

"Preauthorization" refers to the approval granted by EPA prior to cleanup actions if a PRP claim against the Fund for response costs is to be considered. Preauthorization represents EPA's commitment that, if response activities are conducted pursuant to the settlement agreement and the costs are reasonable and necessary, the PRP will be reimbursed from the Fund as set forth in the settlement.

The initial analysis is to determine whether the site is a proper candidate for a preauthorization mixed funding settlement. In addition to the points listed above that identify potential candidates for mixed funding, the nature of the proposed remedy and the PRP's ability to perform it should be considered carefully in assessing a settlement offer that involves preauthorization. The size of the PRP's portion of cleanup responsibility also should be considered. When PRPs commit to pay for a sufficiently high percentage of cleanup costs, they have a strong economic incentive to keep actual response costs within or close to estimates. Additionally, the urgency of the threat posed by the site may influence the decision to agree to preauthorization, if preauthorization would expedite response activities. Prompt initiation of remedial action would be of particular importance for sites that are not currently scheduled for full Fund financing.

Additionally, the preauthorization agreement must be approved by OERR. The OERR evaluation with regard to preauthorization is separate and distinct from the evaluation of the settlement performed by OWPE. In preauthorization agreements, the PRPs prepare a preauthorization proposal for Regional review. The RPM's early notification to OERR and OWPE of the PRP's intention to pursue preauthorization is crucial to the timeliness of Headquarters' review of the proposal and the development of the Preauthorization Decision Document (PDD). After reviewing the settlement according to the ten-point settlement criteria set forth in the Interim Settlement Policy, the RPM forwards the preauthorization proposal to OERR's Hazardous Site Control Division, State and Local Coordination Branch, State Requirements Section and the OWPE CERCLA Compliance Branch. Both Headquarters offices work jointly with the Region in reviewing and approving the PRP's submittal. The Region must also notify DOJ and ensure that the case is entered into CERCLIS.

The Region should consider and plan for the amount of time necessary to process preauthorization applications and the urgency of site conditions when conducting negotiations. Although EPA has set a goal of completing review of individual preauthorization requests within a 45-day period, this time period will vary between submittals.

Preauthorization approval is documented in a Preauthorization Decision Document (PDD), prepared by EPA. PDD contents include:

- A short history of contamination at the site, and the various efforts to rectify the problem
- A summary of the analysis performed by EPA in granting prior approval
- A summary of any issues unresolved at the time of PDD issuance
- A statement of "terms and conditions" that the applicant must meet for the preauthorization to remain valid.

The PRP may not begin work until the PDD is effective. The PDD is effective only when it has been signed by the AA, OSWER and the consent decree has been entered.

The PDD describes standards to be met if the PRP is to receive full reimbursement. In certain circumstances, a claim will be preauthorized contingent on later Agency approval of elements specified in the PDD.

Section 122(b)(4) of CERCLA states that, for cases involving preauthorization, the Fund will assume costs of remedy failure up to a proportion equal to that contributed for the original remedial action. In the event of remedy failure, the Fund portion may be met either through Fund expenditures or by recovering costs from PRPs that were not part of the original settlement. The covenant not to sue does not apply if the remedy fails due to PRP negligence.

Mixed Work

Mixed work settlements allow EPA and the PRPs to conduct discrete portions of the response activity. In mixed work settlements, EPA encourages PRPs to conduct the RA. Mixed work settlements are appropriate in cases where mixed funding is being considered and the following conditions exist:

- The Region is reasonably certain of PRP cooperation.
- Coordination of activities with PRPs does not present problems.
- The RPM can identify, in detail, individual activities for which each party will be responsible.

In addition, CERCLA section 104(c)(3) requires that the State pay or assure payment of 10 percent of the RA, or 50 percent or greater if it's a State-operated facility. The PRPs may enter into an agreement with the State and EPA under State law and CERCLA where the PRPs pay 10 percent to the State and the State obligates funds for use at the site; or the State may use its own funds to pay for any portion of its share that cannot be paid for by PRPs. In either case, EPA and the State should enter into a State Superfund Contract (SSC) to assure cost share and O&M responsibilities. Mixed work and cash outs (discussed below) should not be considered unless the State's cost share is reasonably certain.

Once mixed work is identified as a potential settlement alternative, OWPE and DOJ should be notified.

Cash Out

Cash-out settlements require the PRPs to pay for a portion of the response costs up front, while EPA conducts the response action. Cash-out settlements are not preferred. Cash-out settlements with PRPs generally involve some of the following factors:

- EPA is very confident about the expected RD/RA response costs.
- The cash out will advance work at the site that might not proceed without the settlement funds.

- The percentage of the total costs to be paid by settlors is substantial, unless there are major liability or financial viability concerns.

- The Agency has carefully evaluated evidentiary concerns regarding liability and the value of the settlement and in light of substantial litigation risks believes that settlement is warranted.

- Equitable considerations exist for both settling and non-settling parties, including the nature of any covenants not to sue in the cash-out settlement.

- PRPs lack funds or the ability to secure competent technical support.

The RPM must notify OERR, OWPE and DOJ of Regional intent to pursue a cash-out settlement. Consultation requirements are the same as for preauthorization settlements. In general, cash-out settlements may occur at any stage of the remedial process. However, once Fund-lead response activities are underway, cash-out settlement with some of the PRPs may not be advantageous, since cost recovery generally will be pursued once RA construction commences. Cash-out settlements may include a risk premium that may partially offset EPA's risk due to uncertainties, such as remedy failure or cost overruns.

Unlike preauthorization, there are no limitations to PRP liability for costs resulting from remedy failure in a cash out. Therefore, any future obligations must be specified in the cash-out agreement, including the covenant not to sue.

Additional information on mixed funding will be provided in the forthcoming OWPE/OECM guidance "Mixed Funding Methodology."

De Minimis

A de minimis settlement is a final settlement entered into with parties who meet the requirements of section 122(g)(1) of CERCLA to achieve the goals described below. It is noteworthy that a de minimis settlement may be incorporated into a global agreement with the major contributors and EPA. This is beneficial to major contributors because de minimis money goes to pay for the remediation of the site, instead of going to the general Trust Fund. It is beneficial to de minimis settlors because they can receive contribution protection from the major contributors as well as from EPA.

A PRP is considered de minimis if the settlement with each involves only a minor portion of the response costs and the PRP is a:

- De minimis generator (Section 122(g)(1)(A) of CERCLA): Both the amount of the hazardous substances contributed by the party to the facility and the toxic or hazardous effects of the substances contributed by the party to the facility are minimal in comparison to other hazardous substances at the facility (e.g. usually relatively small quantities generated); or

- De minimis owner (Section 122(g)(1)(B) of CERCLA): As the owner of the real property at which the facility is located, the PRP did not conduct or permit the generation, transportation, storage, treatment, or disposal of any hazardous substance at the facility, did not contribute to the release or threat of release of a hazardous substance at the facility through any action or omission, and the party had no actual or constructive knowledge that the property was used for the generation, transportation, storage, treatment, or disposal of any hazardous substance at the time of purchase. (There are similarities between this provision and the innocent purchaser defense in section 101(35)).

Criteria for Eligibility for De Minimis Settlements

A PRP may settle as a de minimis PRP if:

- Settlement (per PRP) involves only a minor portion of the response costs at the site

- Amount contributed by the individual PRP is minimal in comparison to other hazardous substances at the site

- Toxic or other hazardous effects are minimal in comparison to other hazardous substances at the site

- Settlement is practicable and in the public interest. EPA should evaluate the overall case for practicability, including the case against viable non-de minimis parties who may challenge the settlement. Challenges usually are based on amount of payments by de minimis parties and the basis of those payments.

Necessary Information for Generator De Minimis Settlements

In practice, de minimis settlements generally require:

- Reasonably accurate and complete PRP waste-in information on waste contributions, nature of substances, and financial viability to develop a volumetric ranking for generator PRPs and make adjustments for non-viable shares.

- That cost estimates for the remedial activities at the site be readily available or easy to develop, and the degree of uncertainty of these estimates be known.

- Development of premiums for unknown costs and cost overruns.

- Identification of remaining viable parties.

Potential De Minimis Generator Candidates

Characteristics of potential candidates include the following:

288

- Good waste-in lists with non-viable shares identified
- Past and future costs identified, premiums developed
- De minimis payment and remaining liability are appropriate.

Sites that do not make good candidates for de minimis settlements include those where:

- Poor volumetric or orphan share information is available
- Costs are highly uncertain
- Potential de minimis parties have not conferred with major parties and attempted to settle through them
- Potential de minimis parties are not organized into one group
- Potential de minimis parties are uncooperative in negotiations
- There are no viable non-de minimis parties to undertake the response action.

Timing De Minimis Settlements

Timing of de minimis settlements may involve very small contributors at the RI/FS stage, but generally occurs at the ROD stage, when costs are known.

Consideration of the potential de minimis settlement includes:

- Refining the volumetric contribution taking into account the assignment of non-viable PRPs to all viable PRPs
- Determining a volumetric cutoff
- Refining cost estimates, including past costs, RI/FS, RD/RA, and future costs
- Developing a premium and/or reopeners to reflect the uncertainties of cost estimates
- Presenting the settlement offer, including the model CD or AO, in response to the PRP proposal or to initiate dialogue, and discussing this settlement offer with potential de minimis and non-de minimis parties.

Reopeners

The need for reopeners is determined on the basis of the certainty of costs and use of premiums. In very early settlements (RI/FS stage), the reopeners should be more expansive, and/or the premiums should be more substantial. In addition, volume cutoff levels should normally be set low, so that there can be a cash out based upon large premiums based on worst case response cost scenarios.

Finalizing Settlement

If terms are agreed upon by all parties, the final agreement can be formalized through either an AOC or CD. A record supporting the settlement must be developed. Under the June 17, 1988 delegations (14-13-B and 14-13-E), the first de minimis generator and the first de minimis landowner settlements in each Region require Headquarters concurrence. Additional cases are delegated with Headquarters consultation retained. DOJ concurrence (and, on a CD, signature) is required for de minimis settlements for sites where the total response costs exceed $500,000.

References

OSWER Directive 9834.7, "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA" (June 19, 1987).

OSWER Directive 9834.7-1A, "Interim Model CERCLA Section 122 (g) (4) De Minimis Waste Contributor Consent Decree and Administrative Order on Consent" (October 29, 1987).

OSWER Directive 9835.9, "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements Under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property" (June 6, 1989).

OWPE, "Draft De Minimis Methodologies Paper" (April 28, 1989).

Non-Binding Allocation of Responsibility (NBAR)

An NBAR is an allocation of the total costs of response among the PRPs at a facility. Section 122(e)(3) of SARA allows EPA to develop NBARs and authorizes the Agency to provide NBARs to the PRPs at its discretion. While NBARs may be useful, the PRPs at multi-party sites usually undertake the allocation themselves. An NBAR is not binding on the government or the PRPs and may not be admitted as evidence in court. The costs associated with Agency preparation of an NBAR are to be paid by the PRPs.

NBAR preparation depends primarily on the type and completeness of volumetric data available at the site. The NBAR allocation process is based primarily on the volume contributed by the PRPs, although other factors, such as toxicity and mobility of the hazardous substances, and relative treatment costs may be considered. The allocation process is dependent on information collected during the PRP search.

The RPM and assistant Regional counsel have primary responsibility for developing NBARs. NBARs may be prepared if requested by a substantial percentage of the PRPs. When prepared, NBARs are usually developed toward the end of the RI/FS, but timing may vary. NBARs may be provided to the PRPs after completion of the RI/FS. PRPs may use NBARs to reach agreement among themselves regarding negotiating positions with EPA.

The NBAR allocation of responsibility to each PRP may differ from the volumetric ranking presented in special notice letters (SNL). Percentages previously associated with non-viable parties in SNLs are allocated to the remaining financially viable PRPs. In SNLs, the volume each PRP contributed is presented without adjustments. In NBARs, volume from non-viable parties and orphan shares is distributed among the known viable PRPs. This adjusted figure is further modified by the consideration of the following settlement criteria:

- Strength of the evidence against the PRPs
- Ability of the PRPs to pay
- Litigative risks in proceeding to trial
- Value of obtaining the present sum certain
- Inequities and aggravating factors
- Nature of the post-settlement case.

Settlement Decision Committee (SDC)

The SDC comprises upper-level management officials and has been designed to give timely action on national policy issues and issues that require upper management review. The SDC consists of the following individuals:

- Director, OWPE
- Associate Enforcement Counsel for Waste, OECM
- Director, OERR
- Chief, Environmental Enforcement Section, DOJ
- A Regional program representative
- A Regional counsel representative
- An OGC representative, who participates on legal questions.

Regional representatives to the SDC serve on a six-month rotating basis. The SDC meets monthly to address issues raised by members to the Director, OWPE.

The SDC coordinates decisions on policy issues raised by the Regions. The SDC will decide settlement cases where decisions create precedent that may be transferrable to other cases. In addition, the SDC will monitor the Regions' progress toward finalizing settlements and pending deadlines.

A A Review Team

The Assistant Administrator Review team provides policy direction on settlement concepts. The team is composed of the AA, OSWER, the AA, OECM, and the Assistant Attorney General, Land and Natural Resources Division, DOJ. The team meets as necessary to resolve major policy issues at specific sites as directed by the SDC.

Finalizing Settlement

In order to finalize a settlement on time it is important to negotiate during the first 60 days rather than wait for the GFO before talking. Once the good faith offer has been received, the negotiation team and the PRPs should move quickly to finalize a settlement. Historically, the most successful method of finalizing settlement has been for the Government (EPA/DOJ) to develop iterative drafts of the consent decree that show changes on which PRPs comment. This process should provide for rapid identification of major substantive issues requiring review by other layers of management or more extensive discussion.

It is very important to have the drafts reviewed quickly by all parties because of the tight negotiation deadlines. It is important to establish and adhere to deadlines. Section 106 unilateral administrative orders are an effective tool in driving PRPs who have considerable interest in doing the work but are delaying negotiations to perform the RD/RA.

The Regional Administrator, in consultation with DOJ, is expected to be the primary decision maker on CERCLA settlement issues. Headquarters and Regional authority for finalizing settlements is discussed in the first section of this chapter.

Referral Package

While the settling PRPs are in the process of signing the consent decree, the RPM and assistant Regional counsel must prepare a referral package for formal transmittal of the agreement to DOJ. If the settlement has not been delegated, the goal is to ensure rapid concurrence from Headquarters on the referral package. The referral package must include:

- Ten point settlement document
- Draft complaint
- Signed CD
- Mini-litigation report (if not previously sent).

The DOJ referral package should identify the relief outstanding, including any past costs, and identify non-settlors, assess their liability, their contributions to the site individually and as compared to the settlors (with backup and including percentages), their ability to pay, and set forth a strategy for pursuing non-settlors. If costs are to be written off or not pursued, the rationale must be documented. Additionally, OECM and DOJ should be notified of the referral and any non-settlors that will remain after settlement.

The RPM must also identify the resource needs for oversight of the RD/RA and begin preparations to obtain a third party RD/RA oversight contractor.

For RD/RA settlements that are delegated to the Regions, the completed referral package must be sent to DOJ, with a copy to OECM and OWPE. The preparation of the final referral package should take approximately 45 days. The final referral package must be signed by the Regional Administrator. For non-delegated settlements, the settlement is sent to OECM and OWPE with a copy to DOJ. OWPE provides concurrence and sends the referral package to OECM. The AA, OECM must formally approve the CD, which is then sent to DOJ for approval and lodging in the appropriate court. After DOJ formally receives the consent decree, DOJ concurs on the CD and "lodges" it in court. DOJ must also provide notice of the decree in the Federal Register for a 30-day public comment period. The negotiation team is responsible for preparing EPA's responsiveness summary to public comments. Non-settlors may object to the settlement through adverse comments. The negotiation team should endeavor to anticipate these objections to minimize complications with the court. The court will review the public comments and EPA's responses before deciding whether to approve the settlement. Upon approval, the decree is entered as a final judgment of the court.

Where OWPE and OECM have a consultation role, the draft package should be submitted for review and approval. However, the final package is not required to go physically through the concurrence chain.

J. ***Inducements to Non-Settlors/ Enforcement Options***

If negotiations for PRP implementation of the RD/RA do not result in settlement, the Agency has several enforcement options. The Regions may issue a unilateral administrative order (AOU) compelling the PRPs to implement the RD/RA. The Regions also may choose to litigate the case under section 106 of CERCLA. Section 106 orders generally precede section 106 referrals. EPA may also use the Superfund to implement the RD/RA and the Government may sue PRPs for cost recovery under section 107 of CERCLA. If there is a partial settlement, depending on the nature of the outstanding relief, the government may use section 107 or section 106 authorities.

Section 106 AOUs

The Regional Administrator is authorized to issue section 106 AOUs to compel the PRPs to implement the RD/RA. PRPs have a strong incentive to comply, since sections 106 and 107 authorize a court to assess penalties as well as treble damages for non-compliance without sufficient cause. Section 106 orders require a showing of imminent and substantial endangerment.

Section 106 Litigation

The Regional Administrator may decide to refer the case to DOJ for section 106 litigation. The Region must prepare a referral package. The referral package is similar to that described in Chapter XII, Cost Recovery.

Section 106 litigation also requires that the Agency prove that the site constitutes an imminent and substantial endangerment to human health or the environment. This may be based on the risk assessment in the RI.

Fund — The use of the Fund to implement the RD may be limited by Regional availability of Fund monies. If the PRPs have been recalcitrant or there is a Regional decision to fund the RD if the negotiations fail, advance planning is crucial. A "planned obligation" must be targeted in the SCAP in the fiscal year negotiations where the obligation is targeted. This target is counted against the Region's total Fund budget. In some cases, the scheduled initiation of Fund-financed activity may encourage recalcitrant PRPs to settle.

Partial Settlements — The application of the settlements incentives/disincentives concept may result in a partial settlement for less than full relief. If some or all past costs are deferred to non-settlors, EPA may pursue them under section 107. Under mixed funding settlements, the recalcitrant PRPs may be held liable for the Agency's costs in implementing the RD and RA, RD/RA oversight costs, and past costs.

If the decree covers less than all the remedial work, EPA may "carve out" discrete portions of the remedy for which recalcitrants may be held liable.

K. *Post-Referral Actions by DOJ*

DOJ has a substantial role in cases that are referred with settlement, referred without settlement (sections 106/107) and in ongoing litigation. DOJ's review of referrals with settlement involves an assessment of whether the settlement is in the government's interest and of the legal terminology of the decree. DOJ's assessment of referrals without settlement primarily involves a review of the sufficiency of the evidence regarding liability, selection/implementation of response, and desired legal remedy, costs and defenses. Ongoing litigation support is often resource intensive.

III. PLANNING AND REPORTING REQUIREMENTS

A. *Budget Requirements*

The RPM should be involved in the development of budget estimates of post-RI/FS support needs. Post-RI/FS budget needs include RD/RA negotiations, referral development and litigation support. The standard budgets for the support activities are:

• RD/RA negotiations: (for three quarters)	$30,000
• Referral development: (for three quarters)	$40,000
• Litigation support: (for 12 quarters)	$24,000
• RD/RA Oversight (4 quarters for RD, 6 quarters for RA)	$37,500 per quarter

The primary contract vehicle for RD/RA negotiations support is TES. The primary contract vehicle for RD/RA oversight is ARCS.

The negotiation team should see if RD/RA funding from Superfund is available as an option to be used if negotiations fail. Since the potential demands on the Fund exceed its size, monies may not be available to initiate Fund-financed activity. If funds are available, monies will be committed for the fiscal quarter in which negotiations are scheduled to conclude. Initiation of Fund-financed activity should be planned in the fiscal year preceding the scheduled activity, due to the potentially large amount of money required for RD/RA activity. The availability of Fund money to implement the RD/RA is a valuable tool to force the PRPs to negotiate.

B. *Reporting Requirements*

Periodically, the RPM must review and update the information in EPA's automated data systems. The RD/RA negotiation milestones (actual start date, date of issuance of special notice) must be entered into CERCLIS. The planned start dates for RD/RA negotiations are entered into CERCLIS when the site schedule is developed, and are revised as necessary. RPMs are responsible for ensuring that an accurate CERCLIS Site Information Form (SIF) is completed for RD/RA negotiations. Exhibit VIII-5 presents a sample SIF for RD/RA negotiations. RPMs should use the following outline in preparing the SIF:

A. Negotiation type Code/Name (AN=RD/RA Negotiations)
B. Lead (FE=Federal Enforcement, SE=State Enforcement)
C. Plan start/complete date (FYQ)
D. Actual start/complete date (MM/DD/YY)
E. SPMS Target Status (P=Primary, A=Alternate)
F. SCAP Note (comments on negotiations)
G. Enforcement Activity Outcome Code/Name

H. Number of PRPs involved in the negotiations
I. Remedy Operable Unit
J. Remedy Type Code (RD1=Remedial Design, RA1=Remedial Action; sequence number is required before system will add record).
K. Financial Requirements

  1. Financial Type/Code
  2. Financial Amount (Dollars required to support negotiations)
  3. Financial Plan Date (FYQ)
  4. Contract Vehicle (TES=Technical Enforcement Support)
  5. Budget Source (E=Enforcement)
  6. Case Budget Status (ALT=Alternate, APR=Approved)
  7. Financial Note

In addition, if the site is a mixed funding candidate, Fund dollars should be planned for and indicated on the event SIF. Settlement data should be shown on the settlement SIF while litigation (section 106/107) should be shown on the litigation SIF.

RD/RA Negotiations are initiated when the first SNL is issued to the PRPs or when a waiver of special notice is issued, or when the first general notice letter with expected completion date is issued.

RD/RA negotiations are completed when :

- The signed CD (section 106 or 106/107 referral with settlement) and ten-point analysis is referred by the Region to either DOJ or EPA Headquarters; or

- A section 106 judicial referral for RD/RA without settlement is referred to DOJ or EPA Headquarters; or

- An AOU for RD or RD/RA is issued; or

- A decision is made to proceed with RD as indicated by the obligation of RD funds.

At this time an outcome code (item "G" above) should be recorded.

In addition, if the site is a mixed funding candidate, Fund dollars should be planned for and indicated on the event SIF. Settlement dates should be shown on the settlement SIF while litigation (section 106/107) data should be shown on the litigation SIF.

If the Region is targeting the site for SCAP purposes, the SCAP/SPMS code should be "P." Otherwise it should be coded with an "A." All sites that have started negotiations or are planned for negotiations and have a "P" SCAP/SPMS flag are targets for completion. RPMs should keep the negotiation schedules up-to-date, changing them as site conditions change.

Exhibit VIII-5

Sample SIF for RD/RA Negotiations

NEGOTIATION ACTIVITIES FORM

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS DATA BASE
ENFORCEMENT INFORMATION FORM (SIF)

07/10/89
ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ NPL STATUS: F SITE CLASSIFICATION: ____ RPM/OSC NAME: ____

*EPA I.D. NO.: 222999999999 *FMS SITE/SPILL I.D.: A5 PHONE: (__)__-__

				-----START-----			-----COMPLETE-----				
*NEGOTIATION TYPE CODE	@NEGOTIATION TYPE NAME	*LEAD	PLAN MM/DD/YY	*PLAN FY/Q	*ACTUAL MM/DD/YY	PLAN MM/DD/YY	*PLAN FY/Q	*ACTUAL MM/DD/YY	*SPMS TARGET STATUS		*SCAP NOTE
Ⓐ AN	RD/RA Negotiations	Ⓑ FE	_/_/_	Ⓒ 89/1	Ⓓ 11/16/88	_/_/_	Ⓒ 89/3	Ⓓ _/_/_	Ⓔ P	Ⓕ	May need extension

Ⓖ *ENFORCEMENT ACTIVITY OUTCOME CODE: _ @ENFORCEMENT ACTIVITY OUTCOME NAME: ____
Ⓗ NO OF RPS: 8
ACTIVITY REGIONAL FLD1: ACTIVITY REGIONAL FLD2: ACTIVITY REGIONAL FLD3: ACTIVITY REGIONAL FLD4:

	*REMEDY OP UNIT	*REMEDY TYPE	@REMEDY NAME	*REMEDY QUALIFIER	@REMEDY QUALIFIER NAME	*REMEDY QUALIFIER	@REMEDY QUALIFIER NAME
Ⓘ	01	Ⓙ RD	Remedial Design	_	____	_	____
Ⓘ	01	Ⓙ RA	Remedial Action	_	____	_	____

REMEDY REGIONAL FLD1: REMEDY REGIONAL FLD2: REMEDY REGIONAL FLD3: REMEDY REGIONAL FLD4:

	*FIN I.D.	*FINANCIAL TYPE NAME	*FIN AMOUNT	*PLAN FY/Q	*CONTRACT VEHICLE	BUDGET SOURCE	*CASE BUDGET STATUS	WA AMND NBR	WA NO	*REC DATE	*FINANCIAL NOTE
Ⓚ	_	① 6 Planned Obligation	② 15,000	③ 89/2	④ TES4	⑤ E	⑥ P	_	_	_/_/_	⑦ ____
	_	____	____	_/_	____	_	_	_	_	_/_/_	____

ENF. FINANCIAL REGIONAL FIELDS FLD1: _ FLD2: _ FLD3: _ FLD4: _

ENF. FINANCIAL REGIONAL FIELDS FLD1: _ FLD2: _ FLD3: _ FLD4: _

*INDICATES CORE DATA ELEMENT
@INDICATES SYSTEM GENERATED

Both RD/RA negotiation completion and start dates are SCAP and SPMS targets. All judicial referrals to Headquarters seeking relief under section 106 are SPMS and SCAP targets.

IV. POTENTIAL PROBLEMS/RESOLUTIONS

This section addresses some of the common problems that arise during RD/RA negotiations. While each Region has different methods of resolving these problems, this section discusses some of the more effective Regional experiences.

A. *Poor Relationships Among the PRPs*

In large sites, interpersonal antagonisms can develop between the PRPs. The RPM and assistant Regional counsel should provide information to the PRPs to assist them in coalescing into a steering committee. The RPM should also recommend the use of alternative dispute resolution methods to assist the PRPs in resolving their disputes. Mixed funding may be appropriate if the great majority of parties are cooperative and a minority are recalcitrant.

B. *Multiple Revisions to Draft CD*

The specific language in the draft CD may cause numerous revisions to be made between the PRPs and the Agency. The Agency's policy is that the strict negotiations deadlines help force the PRPs to settle on issues in the language of the CDs. If the deadlines are approaching and it appears that settlement is near, the Regional Administrator may request a second 30-day extension from the AA, OSWER after the initial 30-day extension. To avoid this situation, the negotiation team should insist on short deadlines on revisions to the drafts. Furthermore, weekly or biweekly meetings with the PRPs are advised. These meetings should be scheduled well in advance, so that all parties are aware of the schedule for preparing revised drafts of the CD.

C. *Settling with Majors Involved with De Minimis Settlements*

In some situations, major contributors to a site may be reluctant to negotiate RD/RA settlement terms after some PRPs have settled early under de minimis provisions. The case team may be able to avoid conflict with major parties by soliciting settlement proposals from them prior to finalizing settlement terms with de minimis PRPs. Additionally, the negotiation team may find it beneficial to explain the following advantages of de minimis settlements to the major parties:

- In cases where there are numerous PRPs, it may not be practicable and in the public interest to sue all small parties. Early de minimis settlements therefore may save major parties the expense and time of litigation.
- EPA will require premiums from de minimis settlors.
- Monies from early de minimis settlements may provide start-up funds for major-party conduct of RD/RA activity.

It also may be helpful for the negotiation team to keep the major party steering committee advised of the status of de minimis settlement negotiations.

D. *Use of Public Relations*

Effective use of the media may increase the impact of settlements on the PRP community by providing examples of PRP participation in settlements. Publicizing PRP participation in settlements creates an incentive for future PRP participation in other settlements, and enhances the public policy implications of settlements, thus providing PRPs with a policy rationale for their efforts. Additionally, press coverage of critical pre-settlement actions (e.g., issuance of special notice, commencement of negotiations) may be an effective tool in creating pressure on PRPs to settle expeditiously and cooperatively. RPMs should identify sites as candidates for the use of public relations tools as early as possible and enlist the assistance of Regional Office of Public Affairs staff.

E. *Inadequate PRP Searches*

Negotiating PRPs may be less willing to settle when some of the PRPs at the site have not been identified, or evidence of liability against identified PRPs is not strong enough for those PRPs to decide to settle for their full share of cleanup costs. The negotiation team should work closely with the civil investigator to ensure that a thorough PRP search is conducted and all leads are investigated. The negotiation team should ensure that any new information uncovered during negotiations is considered against the information presented in the report. New information, when considered against information discovered during the initial PRP search, may lead to additional PRPs or increase the evidence of liability against already identified PRPs. The negotiation team should work with the civil investigator to follow up on any leads that may encourage settlement.

F. *Late Challenges to Volumetric Ranking*

Many PRPs wait until EPA solicits a settlement to challenge or question EPA's volumetric ranking. EPA should encourage the steering committee to set up a process for early challenge or the Agency should set up one itself.

V. REFERENCES

Policy	OSWER Directive, "Interim CERCLA Settlement Policy" (December 5, 1984).
Guidance	OSWER Directive 9835.4, "Interim Guidance: Streamlining the CERCLA Settlement Decision Process" (February 12, 1987).
	OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 19, 1987).
	OSWER Directive 9834.10A, "Model Notice Letters" (February 7, 1989).
	OSWER Directive 9839.1, "Interim Guidelines for Preparing Nonbinding Preliminary Allocations of Responsibility" (May 16, 1987).
	OECM, "Covenants Not to Sue Under SARA" (July 10, 1987).
	OECM, "Interim Guidance on Settlements with De Minimis Waste Contributors Under Section 122(g) of SARA" (June 19, 1987).
	OECM, "CERCLA Model Consent Decree" (forthcoming).
	OSWER Directive 9835.7, "Guidance on CERCLA Section 106 Judicial Actions" (February 24, 1989).
	OSWER Directive 9835.9, "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA and Settlements with Prospective Purchasers of Contaminated Property" (June 6, 1989).
Memoranda	OSWER Directive 9012.10-a, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13 B and 14-14 E (June 17, 1988).
	OECM, "CERCLA RD/RA Settlement Negotiations Checklist" (January 26, 1988).
	OWPE, "Comment on Strategy for Initiation of PRP-Financed Remedial Design in Advance of Consent Decree Entry" (June 21, 1988).
	OWPE, "Consent Orders and the Reimbursement Provision Under Section 106(b) of CERCLA" (June 12, 1987).
	OWPE "Draft De Minimis Methodologies Paper" (April 28, 1989).
	OWPE/OECM, "Mixed Funding Methodology" (forthcoming).

Contacts OWPE, CERCLA Enforcement Division (202) 382-4810.

OECM, Deputy Associate Enforcement Counsel (202) 382-5324.

Training OWPE, CERCLA Enforcement Division, Compliance Branch offers periodic training on mixed funding and de minimis settlements. For further information contact FTS 382-4838.

VI. ACTIVITIES CHECKLIST

OECM has developed a CERCLA RD/RA Negotiations Checklist (January 26, 1988), which is included in this chapter as an appendix.

Appendix

DRAFT

CHECKLIST FOR NEGOTIATING SETTLEMENTS FOR CERCLA REMEDIAL DESIGN/REMEDIAL ACTION (RD/RA)

This checklist identifies the key issues to be considered when preparing to conduct negotiations for RD/RAs, either by way of a section 106 consent decree or a section 107 "cash out." It applies regardless of whether we follow the section 122(e) "special notice" procedure or decide, in our discretion, to negotiate without use of section 122 "special notice." The checklist references several guidances with which you should be familiar. In addition to the guidances identified in the checklist, you also should be familiar with the Interim CERCLA Settlement Policy, 50 Fed. Reg. 5,034 (Feb. 5, 1985).

I. Who are the PRPs available for negotiations?

  A. Determine universe of PRPs

    1. Have PRPs been ranked (generators in particular) by volume/waste type?

    2. If information is missing, can gaps be filled through use of adminstrative discovery?

    3. Are there federal PRPs? If so have they been notified. What contribution do we expect from federal PRPs?

    4. Are there municipal PRPs? If so, have they been notified? How do we propose to deal with them?

  B. Evaluate liability issues

    1. How strong is our liability case against each potential RP?

    2. Do one or more of the PRPs have possible defenses (e.g., does the case present innocent landowner issues or transporter issues -- is there evidence that the transporter selected the site)?

    3. Based on # 1 and # 2, are we focusing our efforts on the PRPs from whom we are likely to get the best settlement (i.e., the big percentage PRPs with no defense and against whom we have a strong liability case)?

    4. How strong is the evidence regarding (1) the existence of a release or threatened release of hazardous substances, and (2) the presence of an imminent and substantial endangerment?

   a. Check administrative record: does it or will it contain a finding of a release or threat of release of hazardous substances; did the PRPs contest this finding in their comments; did we provide an adequate response to such comments? (e.g., PRPs may contend that our sampling is inadequate because chain of custody procedures weren't followed. See OWPE's most recent Administrative Record Guidance -- which requires that we collect and maintain this information in the record).

   b. Check administrative record: does it or will it contain an imminent and substantial endangerment finding; did the PRPs contest this finding in their comments; did we provide an adequate response to such comments?

C. Assets of PRPs

   1. Do we need more information?

   2. If information is missing, can we get it through administrative discovery?

   3. Are there any bankruptcy issues? Should proofs of claim be filed?

   4. Do seemingly asset-poor PRPs have insurance coverage? Do we need more information on insurance?

   5. Should we establish a Superfund lien (See CERCLA section 107(1)) upon the property which is the subject of the remedial action? (See Guidance on Federal Superfund Liens, September 22, 1987).

II. Strategy for negotiating

A. PRPs' interest in negotiating

   1. Did we send regular notice letters? If so, what was the PRPs' response?

   2. Have there been previous PRP settlements covering the site (e.g., a section 104(b) RI/FS settlement, or an Administrative Order on Consent)?

   3. Did any PRPs submit public comments, pursuant to CERCLA section 117, on the proposed plan?

4. Have any PRPs submitted FOIA requests regarding the site?

B. Steering committee

1. Is one already in existence?

2. If so, are the parties disposed to settle?

3. If not, should we foster creation of one?

a. Should we call a meeting?

b. Have we sent out a letter suggesting that the PRPs organize?

C. Determine whether we should identify and solicit a separate settlement from an identified class of de minimis PRPs (this is particularly important for sites with more than 50 PRPs)(See Guidance entitled Superfund Program: De Minimis Contributor Settlements, 52 Fed. Reg. 24,333 (June 30, 1987) and Interim Model CERCLA Section 122(g)(4) De Minimis Waste Contributor Consent Decree and Administrative Order on Consent, 52 Fed. Reg. 43,343 (November 12, 1987)).

D. Determine whether we should do an NBAR (See Guidance entitled Superfund Program: Non-Binding Preliminary Allocations of Responsibility (NBAR), 52 Fed. Reg. 19,919 (May 28, 1987)).

E. Determine whether any federal PRPs or municipal PRPs will require special attention.

F. If there are liability issues and remedy issues, consider whether to divide the negotations team into separate units, one to handle liability issues and consent decree matters, and one to handle technical, remedy-related issues.

G. Ensure that steps are being taken to satisfy administrative record requirements regarding our discussions with PRPs.

H. Determine whether the Fund and State-share will be available to implement the remedy if negotiations fail, or if a section 106 AO or judicial action will be required.

1. Determine whether the State will put up its 10 percent share of the remedy.

2. Determine EPA's plans for funding remedial action at the site.

3. If the Fund or State-share is not available, we need to make sure that evidence is available to establish an imminent and substantial endangerment.

I. Have the State and Federal Natural Resource Damage Trustees been consulted?

1. Will they be active participants in the negotiations?

2. Have they raised issues that warrant intra-government resolution?

J. Time period for negotiations: As is discussed below, negotiations will typically last for 120 days, with short extensions permitted if required.

III. Compliance with special notice procedures

A. The Interim Guidance on Notice Letters, Negotiations, and Information Exchange (Special Notice Guidance)(October 19, 1987) requires the use of special notice procedures in the "vast majority of cases" (See Special Notice Guidance, p. 12). If we decide not to use the special notice procedures, we must notify the PRPs in writing of that decision. Section 122(a).

B. Timing issues

1. Has DOJ received 60 days notice before EPA issues the special notice letters which start the special notice process? (See Special Notice Guidance, p. 13).

2. Are there compelling reasons to send out the Special Notice with the RI/FS or with the ROD? The Region has discretion to send out special notice letters anytime between before the RI/FS is released and after the ROD is issued, but the Special Notice Guidance strongly encourages the Region to send out the letters no later than when the RI/FS and Proposed Plan are released (the Region must obtain written HQ (OWPE and OERR) approval to issue the special notice letters with the ROD)(See Special Notice Guidance, p. 17).

3. Negotiations will vary depending on the timing of the special notice letters.

   a. Does the Region have appropriate technical experts available to discuss remedy issues? Releasing notice letters simultaneously with the release of the RI/FS lets PRPs play an active role in the remedy selection process because EPA's proposed remedy is less definite. Consequently, it will be especially important to have access to technical experts during the negotiations on technical issues.

   b. If the ROD was signed before the Special Notice is sent out, have the PRPs submitted comments on the proposed remedy? Was there adequate opportunity to comment? Releasing the special notice letters simultaneously with the ROD gives PRPs a smaller role in the remedy selection process. PRPs are limited to participating in EPA's administrative record process and should have already submitted written comments during the public comment periods afforded under CERCLA. Thus, there should ordinarily be less give and take on the technical issues, and ordinarily less need for active technical support in the negotiations.

C. Draft Consent Decree -- The Special Notice Guidance indicates that a draft consent decree should be ready for distribution with the special notice letters (p. 20).

   1. Have EPA Regional/OECM managers and EES Assistant Chief approved the draft C.D. before it is distributed?

   2. Do any unique aspects warrant higher level policy evaluation? (Oftentimes, coordination of EPA/DOJ policy makers will be needed after PRPs have countered, e.g., PRPs may demand an exceptional circumstances release, § 122(f)(6)).

D. Moratorium -- Under the Special Notice Guidance and section 122 the Agency must refrain from site activity for 60 days following issuance of the special notice so that the PRPs can put together a "good faith" offer. If the PRPs do so, the moratorium on EPA activity (except, possibly, RD work) continues for another 60 days. If the PRPs don't make a good faith offer, the moratorium ends and we can proceed under 104 and/or 106.

1. What constitutes a good faith offer?

   a. Two major components: i) whether the PRPs offer to do or finance a substantial portion of the remedy (mixed funding, de minimis, and covenant not to sue issues may be raised); ii) whether the PRPs' offer goes to a remedy other than the remedy EPA recommends in its proposed plan (or, if the special notice letters are distributed with the ROD, whether the PRPs' offer goes to a remedy other than the remedy which EPA selected in the ROD)?

   b. See generally Special Notice Guidance, p. 21 for the other requirements for a "good faith" offer.

2. The RA can extend this 120 period for 30 additional days when settlement is "likely and imminent." An additional extension beyond 30 days may be approved only by the AA for OSWER. (See Special Notice Guidance, p. 23; Interim Guidance: Streamlining the CERCLA Settlement Process).

IV. Cost Recovery Component of Case

A. Applicable Guidance: (1)Draft Guidance on Maximizing the Recovery of Interest in Cost Recovery Cases, July 14, 1987; (2) Comptroller Policy Announcement 87-17: Interest Rates for Debts Recoverable Under SARA; (3) Procedures for Documenting Costs Under CERCLA § 107 (Lucero, January 30, 1985); (4) Financial Management Procedures for Documenting Superfund Costs (Office of the Comptroller, Sept. 1986); (5) Superfund Indirect Cost Manual for Cost Recovery Purposes FY 1983 through FY 1986 (Office of the Comptroller, March 1986); (6) Superfund Indirect Cost Update (Financial Management Division, January 5, 1987); (7) Superfund Final Indirect Cost Rates for Fiscal Years 1985 and 1986; and (8) Cost Recovery Actions Under CERCLA (OECM, August 1983)).

B. Have we assembled cost documentation? Note that this is a time consuming process and there is often a long lag time between the time when documentation is requested and the time when it is provided.

C. Have we developed a total cost figure? Does it include an amount for indirect costs and an amount for interest?

D. Have we sent out a demand letter?

E. Has DOJ developed a total cost figure and assembled its cost documentation?

F. If ATSDR/CDC have been active at the site, have we determined the amount of their costs?

V. Strategy for Settlement

A. Is the case appropriate for a separate de minimis PRP settlement?

B. Mixed Funding (See Guidance entitled Evaluating Mixed Funding Settlements Under CERCLA, October 20, 1987)

1. Is the case appropriate for possible mixed funding?

2. If so, what percentage should the government bear?

3. NB: The Mixed Funding Guidance indicates that the Regions should analyze both whether mixed funding is appropriate at a particular site and, if so, what type is best, before sending out special notice letters (p. 15). As a practical matter, it will be very difficult for the Regions to complete this analysis before sending out the special notice letters because the Regions will not yet know which PRPs are interested in settling. Without knowing which PRPs are interested in settling, it obviously will be very difficult to evaluate what kind of offer is acceptable (including what type, if any, of mixed funding arrangement would be acceptable).

C. Covenant not to sue (See Guidance entitled Covenants Not To Sue Under SARA, July 10, 1987)

1. Identify whether standard reopeners will be used or whether a special covenant is appropriate based on either (1) § 122(f)(2) or (2) § 122(f)(6) (extraordinary circumstances).

D. Natural Resource damages

1. Has there been an evaluation?

2. Does the trustee have a bottom line?

E. What is the position of the State regarding the settlement? Does it want to be a party to the Consent Decree?

F. Citizen participation

1. Are any toxic tort suits pending?

2. Does the public have a technical assistance grant?

3. Do we anticipate active citizen opposition/support regarding remedy/settlement? Were a large number of citizen comments submitted? Are citizen issues being addressed?

G. The role of the Settlement Decision Committee (SDC) -- EPA has established a procedure for elevating settlement issues to upper-management. (See Interim Guidance: Streamlining the CERCLA Settlement Decision Process). Members of the SDC include: the Chief of EES, the Director of OWPE, OECM's Associate Enforcement Counsel for Waste and, on a rotating basis, one Regional Counsel and one Regional Divison Director for Waste.

1. If an EPA/DOJ or Federal/State dispute arises over the terms of a settlement, it should be discussed immediately with the appropriate EPA management and EES Assistant Chief to determine if SDC resolution is proper. (Deadlines are tight -- do not allow disagreements to fester).

H. Deadline Extension -- Settlement negotiations can be extended 30 days beyond the 120 Moritorium period with permission of the Regional Administrator, and beyond 30 days with the permission of the Assistant Administrator for OSWER. (See page 6 above, § III.D.). If an extension is required it should be discussed with the appropriate EPA and DOJ management so that the necessary extension can be obtained.

VI. Finalizing the Consent Decree

1. AAG and DAG approval -- Within one week after the consent decree is finalized and sent to the Defendants for signature, the requisite approval package should be sent to the AAG for approval. The AAG should be given a separate signature page so that once the consent decree is received from

EPA it can be lodged and noticed in the Federal Register.

2. AA-OSWER/AA-OECM/RA approval -- Within one week after the consent decree is finalized and sent to the Defendants for signature, the requisite approval package should be sent to the RA for approval. Once the RA signs the decree, the package should be sent to the AA-OSWER and the AA-OECM for their approval.

VII. Proceedings Against Non-Settlors

A. In the event that settlement negotiations fail, are we prepared to issue an AO, or to proceed with a section 106 action?

B. In the event that viable non-settlors remain where there is a settlement with less than 100% of the PRPs, (a) are we able to segregate out a portion of the cleanup, e.g., O & M (if so, should we issue an AO?), and (b) are we able to proceed expeditiously against the non-settlors under section 107 for past costs and a declaratory judgment where there is a mixed-funding settlement?

RD/RA IMPLEMENTATION

I. DESCRIPTION OF ACTIVITY 1

- Introduction 1
- RD Activities 1
- RA Activities 1
- RD Initiation 2
- Site Access 2

II. PROCEDURES AND INTERACTIONS 3

III. PLANNING AND REPORTING REQUIREMENTS 4

- A. SCAP/SPMS 4
  - SIF Instructions for RD/RA Implementation 4
  - Remedial Design Activities 5
  - Remedial Action Activities 5

IV. POTENTIAL PROBLEMS/RESOLUTIONS 6

- A. Oversight 6
- B. Incentives for Successful Performance 6
- C. Corrective Actions 6
- D. Non-settling PRPs Deny Site Access To Settling PRPs 7

V. REFERENCES 9

- Guidance 9
- Manuals 9
- Contacts 9
- Training 9

RD/RA IMPLEMENTATION

I. DESCRIPTION OF ACTIVITY

Introduction

When PRPs conduct remedial design and remedial action (RD/RA) activity, the PRPs must perform these activities in accordance with the terms of the settlement agreement. The RPM or State personnel oversee the PRP-conducted response activities. This chapter provides a brief overview of the general sequence of events that occur during a PRP-conducted RD/RA but does not discuss specific procedures and interactions. Exhibit IX-1 presents an overview of the RD/RA implementation process for PRP-conducted activity. Additional guidance on the specific roles and responsibilities of the RPM as well as the procedures and practices to be used in overseeing the implementation of the RD and RA will be available in the revisions to the RD/RA Guidance document being prepared by the Office of Emergency and Remedial Response (OERR), Hazardous Site Control Division (HSCD).

In addition to the overview of the process, two important enforcement policies are described in this chapter. The first policy allows PRP-lead RD activity to begin as soon as the consent decree has been lodged with the court. The second policy relates to the Agency's role in helping PRPs obtain site access if they are unable to do so with a good faith effort.

RD Activities

The RD phase of the project begins when the PRP selects qualified in-house staff or engineering contractors to prepare detailed plans and specifications for the remedial action. The RD often requires field work to confirm or define the site conditions and may include treatability studies if they were not done during the Remedial Investigation/ Feasibility Study (RI/FS) phase. In addition, the PRP should obtain all the necessary permits, approvals and site access agreements during the design phase.

A remedial design work plan should be prepared that clearly and concisely states the activities and schedules of deliverables during the RD phase. Interim deliverables for a design are usually submitted for the conceptual phase at about 30 percent completion, and for the pre-final design phase at 90 percent completion.

The responsibilities of the PRP and the oversight activities of the RPM during this phase are shown in Exhibit IX-2. The responsibilities of the RPM will be further explained in the revisions to the RD/RA guidance being prepared by HSCD.

RA Activities

During the RA phase, the remedy for the site is constructed. The PRP is responsible for ensuring that the construction contractor fulfills the requirements of the plans and specifications of the project, and for overseeing change orders to the construction contract, if they are needed. A change order is a written modification to the contract authorizing changes to the project due to changes in the site conditions or project needs.

The responsibilities of the PRP and the oversight activities of the RPM are shown in Exhibit IX-3. The responsibilities of the RPM will be further explained in the revisions to the RD/RA guidance being prepared by HSCD.

RD Initiation

In the past, when PRPs conducted RD/RA activities, the RD did not start until the consent decree was entered as final by a Federal district court judge. As a result, the PRP's RD/RA projects sometimes were delayed for 12-15 months after the ROD was issued.

These delays in initiating remedial design are not consistent with the Agency's efforts to expedite site clean-up and meet the statutory goal for remedial action starts. Therefore, the initiation of PRP-conducted RD activity is no longer dependent upon the court's entry of the consent decree. The Agency's strategy is to encourage the PRP to agree to settlements wherein engineering design work can proceed upon the lodging of the consent decree by EPA, or where litigation is already pending, upon execution of a stipulation obtained before the start of the RD. By implementing this strategy, RD activities may be initiated before a consent decree is entered. In such cases, the RPM must exercise his/her oversight authority to ensure that the PRP is conducting the RD in accordance with the terms of the settlement agreement.

This strategy of encouraging the PRP to begin the RD as soon as the settlement is lodged will allow PRP-lead projects to begin at approximately the same time as a Fund-lead project for the site.

Site Access

The PRP is responsible for obtaining the necessary site access. Securing appropriate site access early in the RD phase will ensure that no unnecessary construction delays will be caused by either the site owner or the adjoining property owners. RPMs should check to see that the site access obtained by the PRP extends for the duration of the RA and the O&M phases of the response activities when appropriate.

Voluntary access should be obtained whenever possible. Techniques for facilitating voluntary site access include personal contacts with adjacent property owners and a good community relations campaign. If the PRP has difficulty in obtaining voluntary site access, the PRP should notify the RPM in writing. Upon receiving this written notice, the RPM should consult with the Office of Regional Counsel (ORC) and the HSCD Regional Coordinator for advice and assistance.

Section 104(e)(5)(b) of CERCLA authorizes the Agency to either seek an administrative order to prohibit interference with entry or to go directly to court to obtain compliance with its requirement for entry. EPA may use this authority whenever it can establish that there is a reasonable basis to believe that there may be a release or a threatened release of a hazardous substance and access is necessary to carry out response or determine need for response.

Under section 106(a) of CERCLA, the government may also petition a court to grant an injunction directing immediate compliance with the request for entry. This authority may only be invoked if EPA can show that there is an imminent and substantial endangerment to public health and welfare or the environment because of a release or threatened release from a facility. A case example of a non-settling PRP denying site access to settling PRPs is discussed in Section IV of this chapter. For a more thorough discussion of site access, see OSWER Directive 9829.2 "Entry and Continued Access Under CERCLA" (June 5, 1987).

Exhibit IX-1

Overview of RD/RA Implementation Process for PRP-Conducted Activity

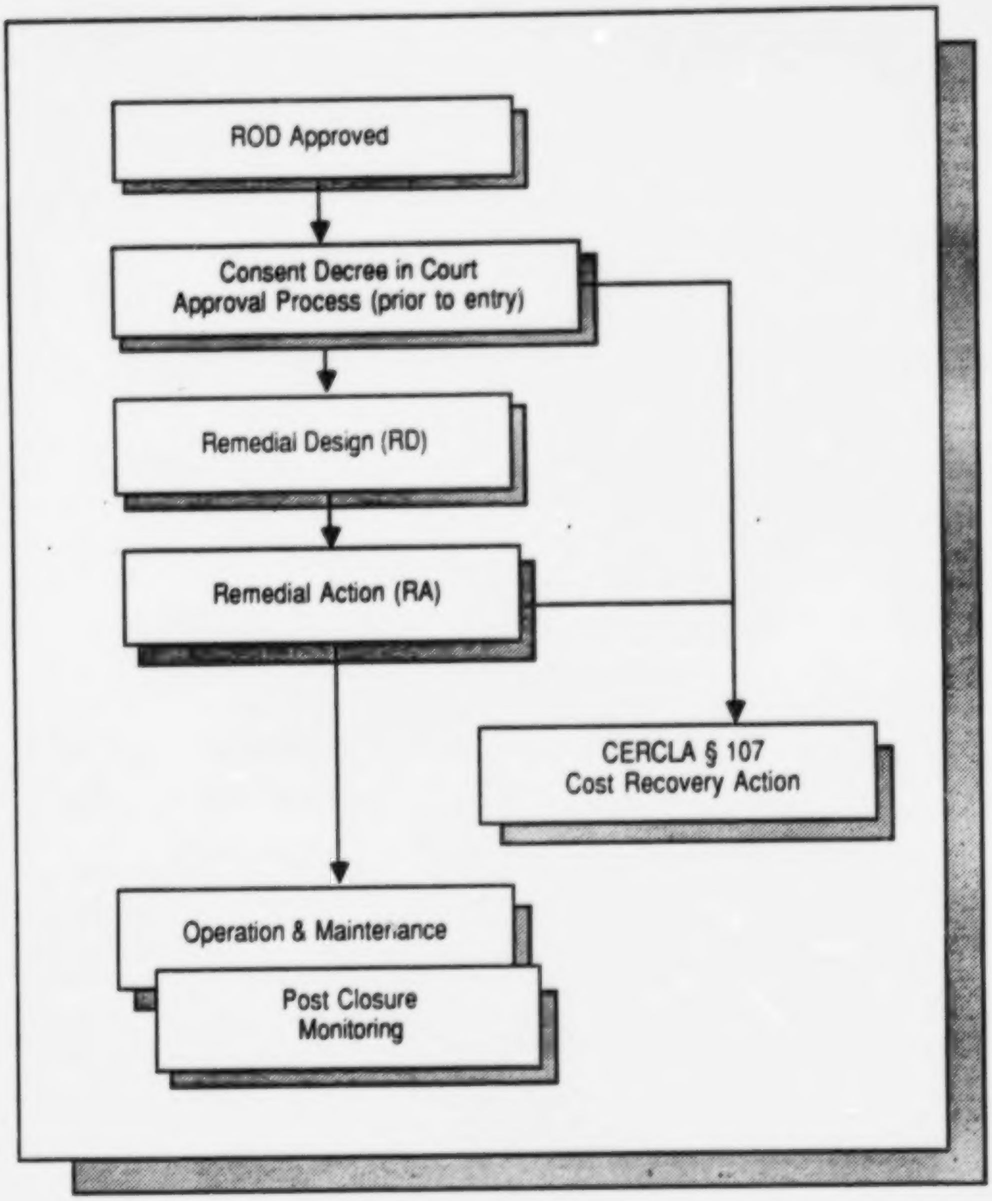


Exhibit IX-2
Oversight Activities For PRP-Conducted Remedial Design

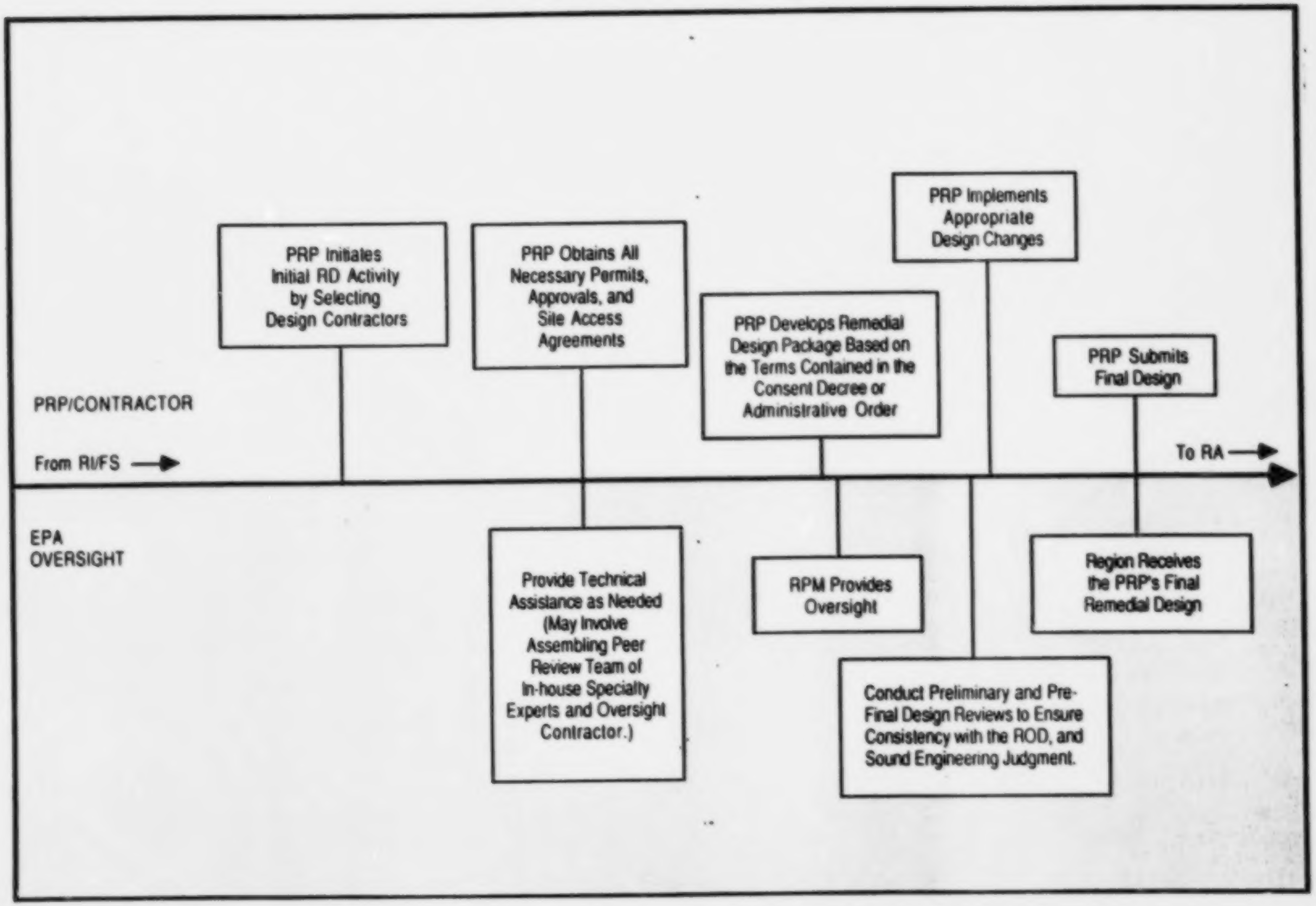
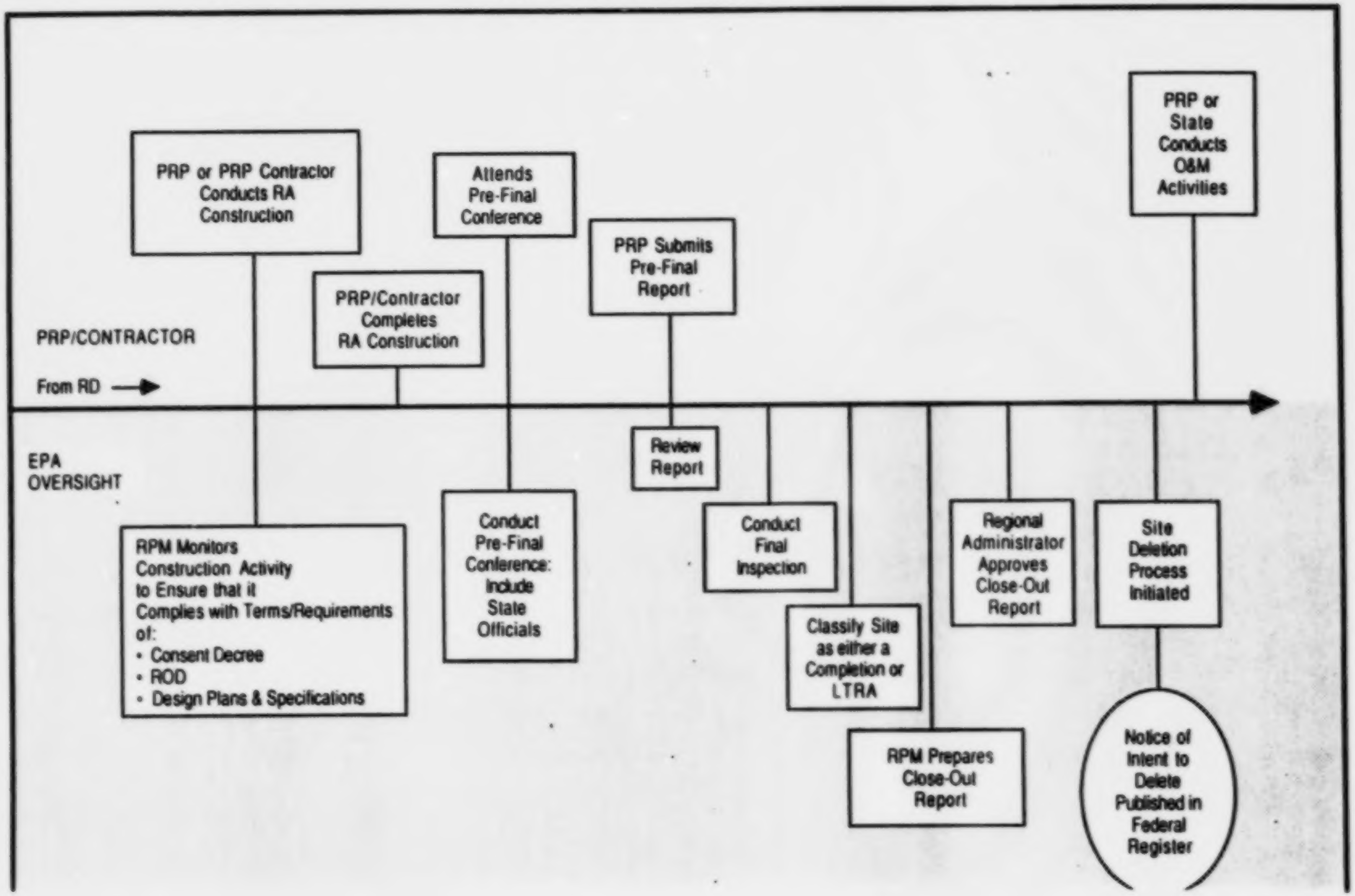

PRP/CONTRACTOR
From RI/FS
EPA OVERSIGHT
PRP Initiates Initial RD Activity by Selecting Design Contractors
PRP Obtains All Necessary Permits, Approvals, and Site Access Agreements
PRP Develops Remedial Design Package Based on the Terms Contained in the Consent Decree or Administrative Order
PRP Implements Appropriate Design Changes
PRP Submits Final Design
To RA
Provide Technical Assistance as Needed (May Involve Assembling Peer Review Team of In-house Specialty Experts and Oversight Contractor.)
RPM Provides Oversight
Conduct Preliminary and Pre-Final Design Reviews to Ensure Consistency with the ROD, and Sound Engineering Judgment.
Region Receives the PRP's Final Remedial Design

Exhibit IX-3

Oversight Activities for PRP-Conducted Remedial Action


PRP/CONTRACTOR
From RD →
EPA OVERSIGHT
PRP or PRP Contractor Conducts RA Construction
PRP/Contractor Completes RA Construction
Attends Pre-Final Conference
PRP Submits Pre-Final Report
PRP or State Conducts O&M Activities
RPM Monitors Construction Activity to Ensure that it Complies with Terms/Requirements of:
• Consent Decree
• ROD
• Design Plans & Specifications
Conduct Pre-Final Conference: Include State Officials
Review Report
Conduct Final Inspection
Classify Site as either a Completion or LTRA
RPM Prepares Close-Out Report
Regional Administrator Approves Close-Out Report
Site Deletion Process Initiated
Notice of Intent to Delete Published in Federal Register

II. PROCEDURES AND INTERACTIONS

This section will be developed by OERR/HSCD once the RD/RA guidance has been revised.

III. PLANNING AND REPORTING REQUIREMENTS

A. *SCAP/ SPMS*

RPMs must ensure that current information on RD/RA activities is entered into CERCLIS for the SCAP. This section discusses the planning and reporting requirements for RD/RA activities. Exhibit IX-4 sets forth the SCAP/SPMS targets and measures for RD/RA activities. RPMs also are responsible for ensuring that an accurate CERCLIS site information form (SIF) is completed for RD/RA activities. Exhibit IX-5 provides an example of a completed RD/RA SIF.

SIF Instructions for RD/RA Implementation

The RPMs should complete the SIF using the example outline of fields and values:

A. Operable Unit (01)
B. Event (RD = Remedial Design, RA = Remedial Action)
C. Lead (F = Fund, RP = PRP financed work under Federal order, S = Federal financed work by a State, PS = PRP under State order with EPA oversight)
D. Plan start/complete date (FYQ)
E. Actual start/complete date (FYQ)
F. SPMS Target (P = Primary, A = Alternate, Q = Delayed)
G. SCAP Note (Capping)
H. Subevent Type (AC = Contract Award, this is required for counting post-SARA RAs)
I. Plan/Actual start/complete date (FYQ, MM/DD/YY)
J. Takeover Flag (See below)
K. First start/complete (A = First and only; B = First of several; C = Subsequent, but not last of several; D = last of several)
L. Event Start NPL Indicator (Y/N)
M. Financial Requirements:

    1. Financial Type (P = Planned Obligation)
    2. Budget Source (R = Remedial)
    3. Financial Amount (Amount required for oversight if PRP lead RD/RA)
    4. Plan/Actual Financial Date (FYQ, MM/DD/YY)
    5. Financial Vehicle (ARC = Alternate Remedial Contracting)
    6. Fund Priority Status (APR = Approved, ALT = Alternate)

For a Fund-financed RD (F, S, SE, and EP leads), the start date is the date of the first obligation for the RD. For a PRP-conducted RD (MR, RP, and PS leads), the date the contract is awarded by the PRP is the start date. For PS lead, the date the State order for RD is signed or the date the State gives the PRPs notice to proceed with the RD is the start date.

For a Fund-financed RA (F and S leads), the start date is the date of the first RA obligation. For a PRP-lead RA, the date the RD is approved and accepted is the start date.

The completion date for an RD, PRP- and Fund-financed, is the date EPA or the State concurs on the approved and accepted design, whichever is later.

Exhibit IX-4

SCAP/SPMS Targets and Measures for RD/RA

SCAP/SPMS Targets

ACTIVITIES	SPMS TARGET	SCAP TARGET	QUARTERLY TARGET	ANNUAL TARGET
Remedial Design (RD) (S/C-4)	X*		X	X
First RD Start		X	X	X
Subsequent RD Starts		X	X	X
Final RD Start		X	X	X
Remedial Action (RA) Start (S/C-5)	X*		X	X
First RA Start - RP		X	X	X
First RA Start - Fund		X	X	X
Subsequent RA Start - RP		X	X	X
Subsequent RA Start - Fund		X	X	X
Final RA Start - RP		X	X	X
Final RA Start - Fund		X	X	X
NPL Sites with RA Starts Post-SARA		X	X	X
Final RA Completions		X	X	X

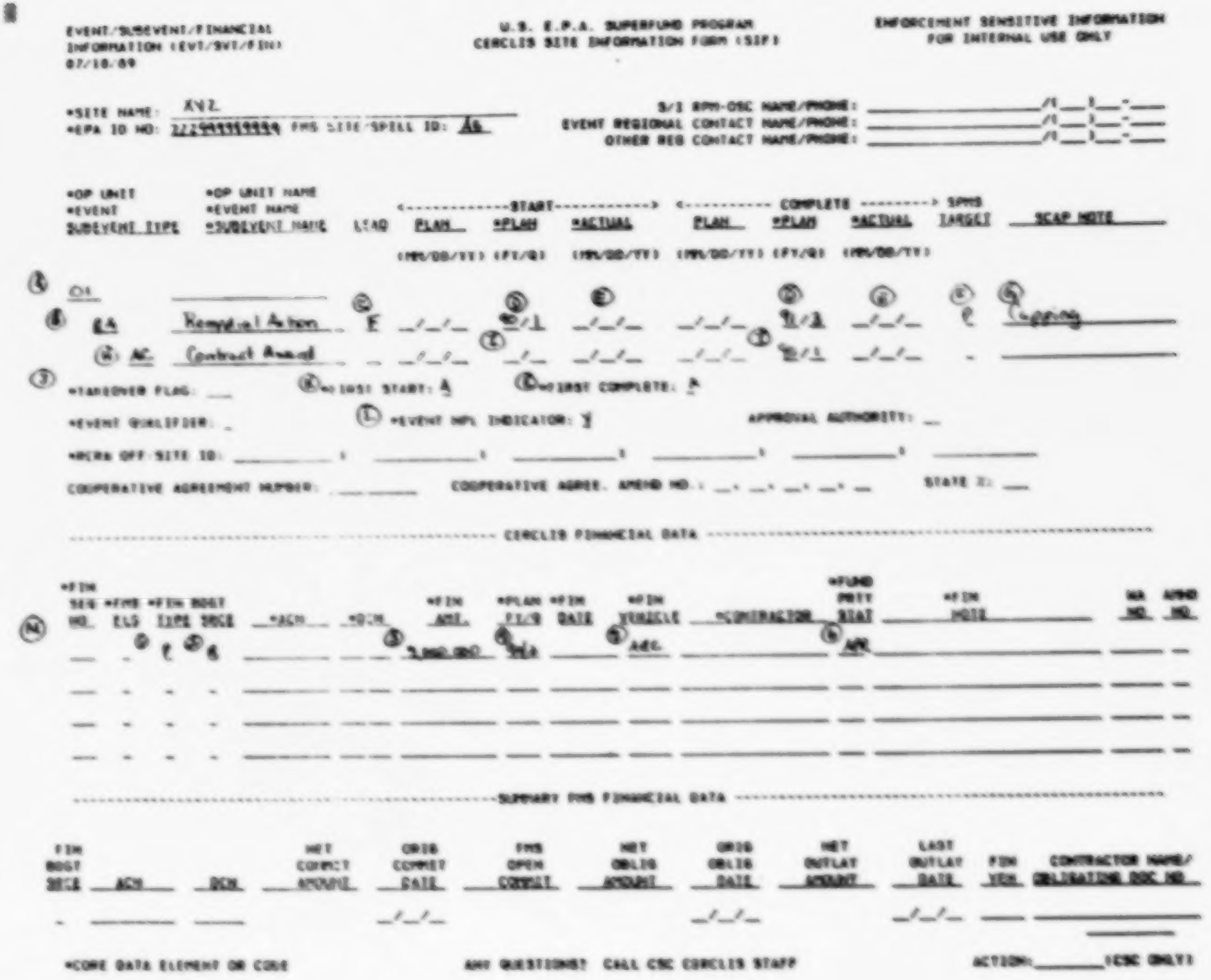
* The SPMS target combines first, subsequent and final as a single target.

SCAP/SPMS Measures

ACTIVITIES	SPMS REPORTING	SCAP PLAN/REPORT	QTRLY	ANUAL
RD Completions		X	X	X
RA Completions		X	X	X
RA On-Site Construction		X	X	X

Exhibit IX-5

Sample SIF for RD/RA Activity



EVENT/SUBEVENT/FINANCIAL
INFORMATION (EVT/SVT/FIN)
07/10/89

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS SITE INFORMATION FORM (SIF)

ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
*EPA ID NO: ZZZ999999999 FMS SITE/SPILL ID: A6

S/I RPM-OSC NAME/PHONE: ____________/(__)__-__
EVENT REGIONAL CONTACT NAME/PHONE: ____________/(__)__-__
OTHER REG CONTACT NAME/PHONE: ____________/(__)__-__

*OP UNIT *EVENT SUBEVENT TYPE	*OP UNIT NAME *EVENT NAME *SUBEVENT NAME	LEAD	START PLAN (MM/DD/YY)	START *PLAN (FY/Q)	START *ACTUAL (MM/DD/YY)	COMPLETE PLAN (MM/DD/YY)	COMPLETE *PLAN (FY/Q)	COMPLETE *ACTUAL (MM/DD/YY)	SPMS TARGET	SCAP NOTE
Ⓐ OU	________	Ⓒ	Ⓓ		Ⓔ		Ⓕ	Ⓖ	Ⓔ	Ⓖ
Ⓑ RA	Remedial Action	F	_/_/_	90/1	_/_/_	_/_/_	91/2	_/_/_	C	Capping
Ⓗ AC	Contract Award	_	_/_/_	Ⓘ _/_	_/_/_	_/_/_	Ⓘ 90/1	_/_/_	-	________

Ⓙ *TAKEOVER FLAG: __ Ⓚ *FIRST START: A Ⓛ *FIRST COMPLETE: A

*EVENT QUALIFIER: _ Ⓛ *EVENT NPL INDICATOR: Y APPROVAL AUTHORITY: _

*RCRA OFF-SITE ID: ________, ________, ________, ________, ________, ________

COOPERATIVE AGREEMENT NUMBER: ______ COOPERATIVE AGREE. AMEND NO.: __, __, __, __, __ STATE %: __

------------------------------- CERCLIS FINANCIAL DATA -------------------------------

Ⓜ

*FIN SEQ NO.	*FMS ELS	*FIN TYPE	BDGT SRCE	*ACN	*DCN	*FIN AMT.	*PLAN FY/Q	*FIN DATE	*FIN VEHICLE	*CONTRACTOR	*FUND PRTY STAT	*FIN NOTE	RA NO.	AMND NO.
__	_	Ⓞ C	Ⓟ 6	______	__ __	Ⓠ 3,000,000	Ⓡ 90/1	______	Ⓢ AEG	________	Ⓣ AR	________	____	_
__	-	-	-	______	__ __	______	__	______	____	________	__	________	____	_
__	-	-	-	______	__ __	______	__	______	____	________	__	________	____	_
__	-	-	-	______	__ __	______	__	______	____	________	__	________	____	_

------------------------------- SUMMARY FMS FINANCIAL DATA -------------------------------

FIN BDGT SRCE	ACN	DCN	NET COMMIT AMOUNT	ORIG COMMIT DATE	FMS OPEN COMMIT	NET OBLIG AMOUNT	ORIG OBLIG DATE	NET OUTLAY AMOUNT	LAST OUTLAY DATE	FIN VEH	CONTRACTOR NAME/ OBLIGATING DOC NO
-	______	____		_/_/_			_/_/_		_/_/_	____	________

*CORE DATA ELEMENT OR CODE

ANY QUESTIONS? CALL CSC CERCLIS STAFF

ACTION:______(CSC ONLY)

The completion date for an RA is the date the Regional Administrator provides written notice to the appropriate party (EPA, State, or PRP) of EPA's acceptance of the completed RA.

The takeover flag is an indicator that identifies events that have had a change in lead. The valid codes are: T = Takeover, TT = Takeover of a takeover, and EV# = An event code (C2111) followed by a sequence number to indicate which event was taken over that created the new event record.

Remedial Design Activities

RDs are planned on a site-specific basis. Initial schedules for RD are established when RI/FS activities are initiated at the site. The RPM should ensure that these initial schedules are updated in CERCLIS as more accurate planning data become available.

There are four separate SCAP and SPMS activities:

- First RD Start
- Subsequent RD Start
- Final RD Start
- RD Completion.

The CERCLIS definitions of first, subsequent, and final RD starts are combined.

Remedial Action Activities

Remedial actions are planned on a site-specific basis and reported in CERCLIS. The Regions are responsible for identifying RA projects and associating planned obligations with these sites.

Seven SCAP and SPMS activities are tracked:

- First RA Start
- Subsequent RA Start
- Final RA Start
- NPL Sites with RA Start Post-SARA
- RA Completions
- Final RA Completions
- NPL Deletion Initiation.

RA starts (first, subsequent, and final) are targeted on a combined program basis. RA completions and final RA completions also are targeted on a combined basis.

IV. POTENTIAL PROBLEMS/RESOLUTIONS

A. *Oversight*

For PRP-lead RD/RAs, the oversight funding is obtained from the remedial budget. If the RPM requires technical assistance in performing his/her oversight responsibilities, the primary contract vehicle is ARCS. RPMs also should be aware that the Agency encourages use of the U.S. Army Corps of Engineers for providing technical assistance. In addition, in-house technical assistance is often available, which proves to be both cost-effective and timely. In addition to contractor support, EPA should assemble a peer review team comprising various senior RPMs and specialty experts (i.e., wetlands expert to review wetland issues). EPA also can seek technical advice through IAGs as vehicles to access specialty experts from such organizations as the U.S. Fish and Wildlife Service, NOAA, and Marine Fisheries.

B. *Incentives for Successful Performance*

To enhance a cooperative problem-solving approach for the PRP-lead RD/RA, the RPM should identify areas in which the PRP has achieved significant success in remedying the problems caused by the hazardous substance release. RPMs could acknowledge these accomplishments by suggesting that Regional management either send a letter to the PRP or provide public acknowledgment in the media (newspapers, television, or radio). Performance incentives are effective and inexpensive support for the PRP to continue to achieve steady RD/RA implementation progress. Successful PRPs also provide other PRPs with models.

If the PRP sustains its outstanding performance resulting in steady RD/RA implementation progress, the RPM may suggest that Regional management approve a more flexible EPA oversight posture.

C. *Corrective Actions*

If the RPM determines that the PRP is failing to comply with the terms of the consent decree, the RPM should generally approach the problem in a constructive manner. The RPM's first course of action is to:

- Identify the problem and devise appropriate corrective action based on the terms agreed to in the consent decree for addressing late or inadequate performance by the PRPs

- Document thoroughly all contacts with the PRPs concerning the inadequacies of their implementation

- Discuss the proposed corrective action with Regional management to determine whether the RPM is maintaining a fair and consistent Regional approach in overseeing the PRP's response activities

- Contact ORC for advice on how to proceed in the event enforcement becomes necessary.

After determining whether the proposed corrective action is consistent with the Region's approach, the RPM should initiate a discussion with the PRP to identify appropriate corrective actions. For example, the RPM could take any one of the following types of corrective action:

- Send a warning letter to the PRP describing the problem and the desired response
- Hold a formal meeting with the PRP
- Provide the PRP with additional guidance to clarify EPA requirements
- Expand the level of EPA oversight by increasing the level of communications and number of site visits.

If the corrective actions do not alter the PRP's performance and significant problems continue to persist, then the RPM may advise the Regional Administrator to take one of the following corrective measures:

- Issue a Stop Work Order
- Invoke stipulated penalties
- Initiate administrative or judicial measures
- Revert to Fund-lead RD/RA.

Before requesting the Regional Administrator to impose these measures, the RPM must thoroughly document the specific problems and the corrective actions attempted.

D. *Non-settling PRPs Deny Site Access To Settling PRPs*

The issue of site access may cause problems when some, but not all, PRPs agree to implement RD/RA activities under EPA supervision. The recent case of U.S. v. Murtha in Region I illustrates this point. The facts of the case are discussed below.

In Murtha, the Agency entered into a settlement agreement with 32 corporations alleged to have generated hazardous waste. The terms of this agreement were embodied in a consent decree. It obligated the settling PRPs to implement the remedy chosen by EPA for the site.

Most PRPs involved at the site were parties to the consent decree. However, the owner of the facility ("owner") failed to reach a settlement agreement with EPA. While the owner did not oppose EPA's right to access, the owner sought to block the settling PRPs and their contractors from entering the site to conduct the response activity because of his contention that he would be liable for their negligence in carrying out the remedy. EPA brought suit against the owner seeking an injunction requiring the owner to permit the settling PRPs to enter the site.

The court decided that the owner of a facility does not have veto power over necessary remedial actions. The court relied upon a broad interpretation of section 106(a) of CERCLA to provide the authority for the settling PRPs to gain site access. The court ruled that an owner-in-possession of a facility cannot halt the remedial process merely because he did not join in a settlement agreement with EPA. The court issued an injunction granting EPA and the settling PRPs full unrestricted access for the purpose of conducting response activities at the site.

The Murtha case demonstrates how the problem of site access can be addressed where section 104(e) of CERCLA is not sufficient to provide what the Agency needs. Section 106 of CERCLA grants the Agency authority to seek injunctive relief when a non-settling PRP seeks to interfere with PRP-conducted remedial action when it is undertaken pursuant to a consent decree.

327

V. REFERENCES

Guidance

OSWER Directive 9320.2-3A, "Procedures for Completion and Deletion of Sites from the NPL" (November 1988).

OSWER Directive 9355.O-4A, "Superfund Remedial Design and Remedial Action Guidance" (June 1986).

OSWER Directive 9355.1-02, "The RPM Primer: An Introductory Guide to the Role and Responsibilities of the Superfund Remedial Project Manager" (September 1987).

OSWER Directive 9829.2, "Entry and Continued Access Under CERCLA" (June 5, 1987).

OSWER Directive 9835.4-2A, "Initiation of PRP-Financed Remedial Design in Advance of Consent Decree Entry" (November 1988).

Manuals

OSWER Directive 9355.1-1, Superfund Federal-Lead Remedial Project Management Handbook (December 1986).

OSWER Directive 9355.2-1, Superfund State-Lead Remedial Project Management Handbook (December 1986).

OSWER Directive 9200.3-01B, Superfund Comprehensive Accomplishments Plan (SCAP) Manual (updated annually).

Contacts

Technical Issues and Oversight
Office of Emergency and Remedial Response (OERR), Hazardous Site Control Division (HSCD), Construction and Management Branch, FTS 475-6707.

Access
Office of Enforcement and Compliance Monitoring (OECM) CERCLA Branch, at FTS 382-3077.

Training

"Introduction to Remedial Design Schedule Management," course offered periodically by OERR. For further information call FTS 382-2457.

"Management of Construction in the Superfund Program," course offered periodically by OERR. For further information call DD (303) 236-8330.

OPERATION AND MAINTENANCE

I. DESCRIPTION OF ACTIVITY 1

Introduction 1

II. PROCEDURES AND INTERACTIONS 2

A. Settlement Negotiations 2
B. O&M Plan 2
C. O&M Oversight 2

III. PLANNING AND REPORTING REQUIREMENTS 3

IV. POTENTIAL PROBLEMS/RESOLUTIONS 4

A. State Funding 4
B. Transfer of Property 4
C. RA Restart 4

V. REFERENCES 5

Regulations 5
Guidance 5
Contacts 5

OPERATION AND MAINTENANCE

I. DESCRIPTION OF ACTIVITY

Introduction

Operation and Maintenance (O&M) can be defined as those activities required for maintaining the effectiveness of response actions and/or monitoring site conditions to determine the occurrence of a new or recurring environmental threat. O&M will generally be required at sites where waste has been left on site. O&M activities may include periodic inspection and maintenance of waste containment measures, long-term air or water monitoring, certain institutional controls, leachate collection and treatment or disposal for source control measures, or any other periodic activity necessary to ensure the continued protection of public health and the environment. O&M activities begin immediately upon approval of the site close out report by the Regional Administrator. This report gives the Agency assurance that the site is protective of public health and the environment. This report is completed only after the cleanup goals for the site have been achieved and all components of the remedy are operational and functional. The guidelines and requirements for O&M at enforcement sites are identical to those at remedial sites.

Activities required to treat soils or ground water, including time required for natural attenuation to achieve cleanup goals, are not considered O&M. Rather, these activities are defined as Long Term Response Actions (LTRA). These activities are considered part of the Remedial Action (RA) and will be continued until such time as cleanup goals are achieved and a close out report is approved by the Regional Administrator. O&M activities, however, may still be required after this point in time. In cases where Fund finances are used to restore contaminated ground water or surface water to a level that assures protection of public health and the environment, the NCP states that the operation of such activities shall be considered part of the RA only for a period of up to 10 years following construction or installation and commencement of operation. Activities required beyond the 10-year period shall be considered O&M.

Fund resources shall not be used to perform O&M activities. At enforcement sites, O&M may be conducted by the PRP, State, or other government entity (such as a county government). EPA will not conduct or finance O&M activities at Fund-lead or non-Fund-lead sites.

II. PROCEDURES AND INTERACTIONS

A. Settlement Negotiations

It is essential that responsibility for O&M activities and oversight be addressed during consent decree negotiations. A description of required O&M activities and projected costs for the site should be available from the FS and/or the ROD. If not, it is the RPM's responsibility to clearly spell out the O&M activities and level of oversight that will be required and the corresponding costs for use in negotiations. The determination of responsibility for O&M and O&M oversight must be made prior to signing the CD and set forth in the document. Every effort should be made to have the PRP perform O&M. If the PRP will not perform the O&M, then the State should assume responsibility for these activities.

B. O&M Plan

During the Remedial Design (RD), a detailed O&M plan shall be prepared that clearly defines the O&M activities required for the site and provides a detailed cost estimate. This requirement should be clearly defined in the design statement of work (SOW). The O&M plan may be amended during construction based on unexpected site conditions and the actual characteristics of the implemented remedy. These changes to the O&M plan must be made prior to the approval of the close out report. Exhibit X-1 sets forth the basic elements of an O&M plan. At sites where multiple operable units are implemented, it is possible that each operable unit will require a distinct O&M activity. In this case, the O&M activities for each operable unit will commence following completion of the RA report for that activity and EPA's acceptance of the work, and will not rely on an approved close out report to signify the start of O&M.

C. O&M Oversight

Responsibility for oversight of O&M activities is set forth in the settlement document. In cases where the State is a signatory to the CD, the State should assume responsibility for oversight. In situations where the State is a PRP, EPA may have O&M oversight responsibilities. The oversight agency must monitor the O&M activity for compliance with the terms of the settlement document and the O&M plan.

Exhibit X-1(1)

Basic Elements of an Operation and Maintenance Plan

A. Description of Normal Operation and Maintenance

1. Description of tasks for operation
2. Description of tasks for maintenance
3. Description of prescribed treatment of operating conditions
4. Schedule showing frequency of each O&M task

B. Description of Potential Operation Problems

1. Description and analysis of potential operating problems
2. Sources of information regarding problems
3. Common remedies

C. Description of Routine Monitoring and Laboratory Testing

1. Description of monitoring tasks
2. Description of required laboratory tests and their interpretation
3. Required QA/QC
4. Schedule of monitoring frequency and when, if so provided, to discontinue

D. Description of Alternate O&M

1. Should systems fail, alternate procedures to prevent undue hazard
2. Analysis of vulnerability and additional resource requirements should a failure occur

E. Safety Plan

1. Description of precautions, necessary equipment, etc., for site personnel
2. Safety tasks required in event of systems failure (may be linked to site safety plan developed during remedial response)

F. Description of Equipment

1. Equipment necessary for plan
2. Installation of monitoring components
3. Maintenance of site equipment
4. Replacement schedule for equipment and installed components

G. Annual Budget (to be prepared by PRP or contractor performing O&M)

1. Cost of personnel
2. Costs of preventive and corrective maintenance
3. Costs of equipment, supplies, etc.

Exhibit X-1 (2)

4. Costs of any contractual obligation (e.g., lab expenses)
5. Costs of operation (e.g., utilities, energy costs)

H. Records and Reporting Mechanisms Required

1. Daily operating logs
2. Laboratory records
3. Records for operating costs
4. Mechanism for reporting emergencies
5. Personnel and maintenance records
6. Monthly/annual reports to State agencies

III. PLANNING AND REPORTING REQUIREMENTS

RPMs are responsible for ensuring that an accurate CERCLIS site information form (SIF) is completed for each site in the O&M phase of response activities. Exhibit X-2 provides an example of a completed SIF for O&M. The RPM should complete the SIF using the following sample outline of fields and values.

A. Operable Unit (01)
B. Event (OM = Operation and Maintenance)
C. Lead (F = Fund, RP = PRP)
D. Plan start/complete date (MM/DD/YY)
E. Actual start/complete date (MM/DD/YY)
F. First start/complete (A = First and only, B = First of several, C = Subsequent, but not last of several, D = last of several)
G. Event Start NPL Indicator (Y/N)
H. Cooperative Agreement Number
I. Cooperative Agreement Amendment Number
J. State %
K. Financial Requirements:

    1. Financial Type (P = Planned Obligation)
    2. Budget Source (R = Remedial)
    3. Financial Amount (amount required for oversight)
    4. Plan/Actual Financial Date (FYQ, MM/DD/YY)
    5. Financial Vehicle (CAG = Cooperative Agreement)
    6. Fund Priority Status (APR = Approved, ALT = Alternate)
    7. Financial Note.

Planning and reporting requirements are governed by the terms set forth in the settlement document. Generally, cost documentation records must be maintained in cases where preauthorization is part of the settlement, because EPA will not pay O&M costs. In some situations, EPA may pay partial "shake-down" costs for a period of one year. Shake-down costs are those costs associated with the implementation of O&M activity.

IV. POTENTIAL PROBLEMS/RESOLUTIONS

A. *State Funding* RPMs should monitor the settlement negotiations closely to ensure that, in instances where the State assumes O&M responsibility, the State can guarantee funding for the duration of the O&M activities. Since State funding for such activities is usually appropriated yearly, the State's assurance may require special action by the State legislature to guarantee funding. Some State statutes prohibit the use of public funds to maintain private property. In these cases, the PRP usually must assume responsibility for O&M, or establish a trust fund or make other arrangements to provide the State the money for O&M. The Superfund branch of the Waste Management Division and Office of Regional Counsel in Region IV have experience handling the State funding issues discussed in this paragraph.

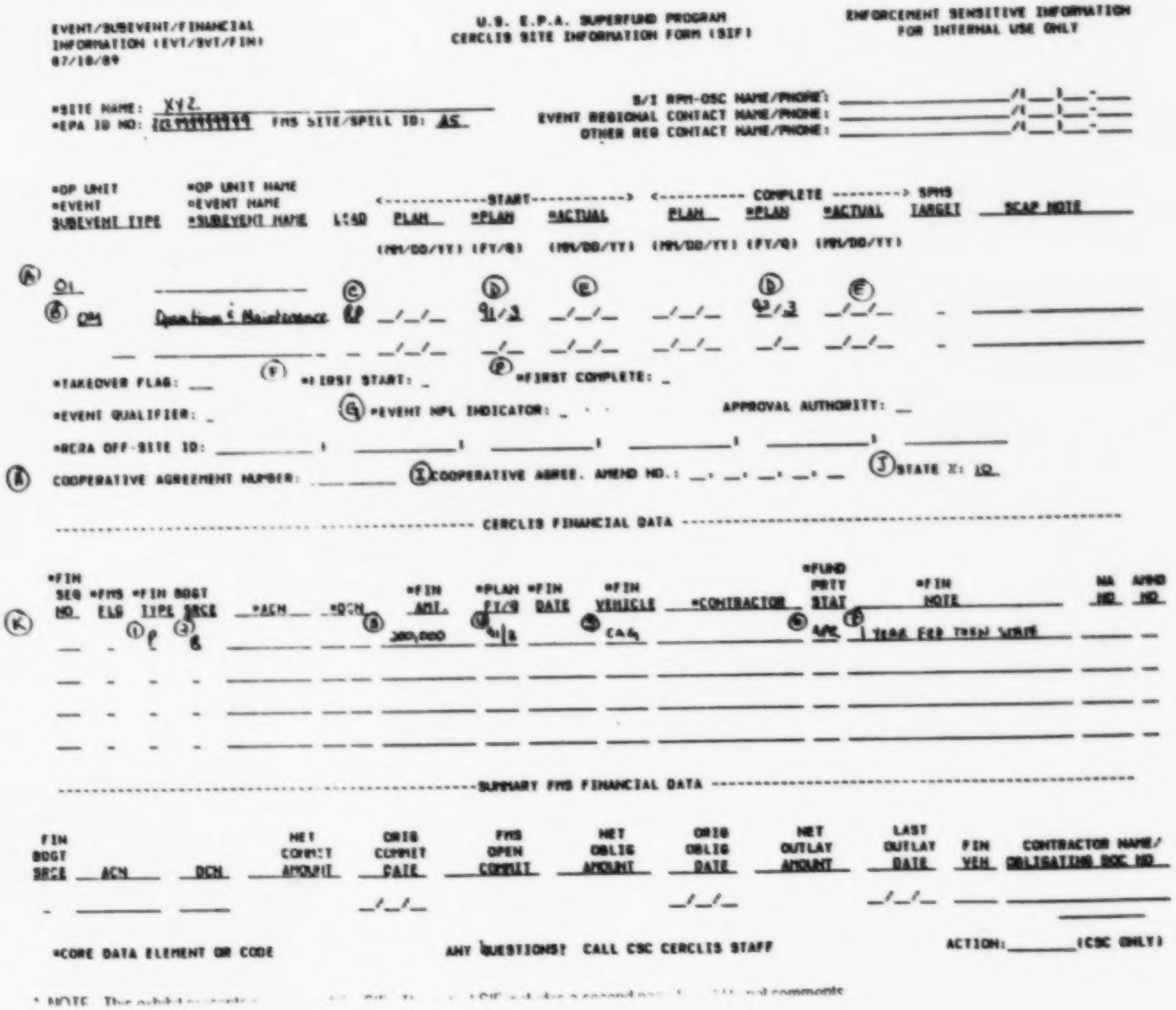
B. *Transfer of Property* RPMs, in conjunction with Regional counsel, must ensure that the settlement contains provisions in the event that the property on which the site is located is sold. The settlement decision must contain assurances for O&M conduct and financing in the event the property is sold. Restrictions on the use of such property may be accomplished by means of institutional controls. Issues related to property transfer and O&M assurances must be addressed on a site-specific basis by the Office of Regional Counsel.

C. *RA Restart* In certain instances, it may be difficult to determine when site activity falls under the scope of routine O&M and when site activity actually represents the restart of removal or remedial activity. For example, repairing a clay cap may be a routine measure required to maintain the integrity of the remedy, or it may be a removal action required to abate an immediate threat to human health, welfare, or the environment.

To prevent confusion between O&M and the restart of remedial activity, the settlement document should contain a detailed description of what constitutes a failed remedy. The settlement document also should contain very specific criteria for determining whether an activity is part of O&M or actual RA. Resolution of this issue may be accomplished through careful examination of the provisions of the settlement and site conditions by the RPM, Regional counsel, the PRPs, and State technical personnel.

Exhibit X-2

Sample SIF for O & M



EVENT/SUBEVENT/FINANCIAL
INFORMATION (EVT/SVT/FIN)
07/10/89

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS SITE INFORMATION FORM (SIF)

ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
*EPA ID NO: ID999999999 FMS SITE/SPILL ID: AS

S/I RPM-OSC NAME/PHONE: ______/(__)__-__
EVENT REGIONAL CONTACT NAME/PHONE: ______/(__)__-__
OTHER REG CONTACT NAME/PHONE: ______/(__)__-__

	*OP UNIT *EVENT SUBEVENT TYPE	*OP UNIT NAME *EVENT NAME *SUBEVENT NAME	LEAD	START PLAN (MM/DD/YY)	START *PLAN (FY/Q)	START *ACTUAL (MM/DD/YY)	COMPLETE PLAN (MM/DD/YY)	COMPLETE *PLAN (FY/Q)	COMPLETE *ACTUAL (MM/DD/YY)	SPMS TARGET	SCAP NOTE
Ⓐ	01	______			Ⓓ	Ⓔ		Ⓓ	Ⓔ		
Ⓑ	OM	Operation & Maintenance	Ⓒ RP	_/_/_	91/3	_/_/_	_/_/_	92/3	_/_/_	-	______
	__	______	-	_/_/_	_/_	_/_/_	_/_/_	_/_	_/_/_	-	______

*TAKEOVER FLAG: __ Ⓕ *FIRST START: _ Ⓕ *FIRST COMPLETE: _

*EVENT QUALIFIER: _ Ⓖ *EVENT NPL INDICATOR: _ APPROVAL AUTHORITY: _

*RCRA OFF-SITE ID: ______, ______, ______, ______, ______, ______

Ⓗ COOPERATIVE AGREEMENT NUMBER: ______ Ⓘ COOPERATIVE AGREE. AMEND NO.: _, _, _, _, _ Ⓙ STATE %: 10

------------------------------ CERCLIS FINANCIAL DATA ------------------------------

	*FIN SEQ NO.	*FMS FLG	*FIN TYPE	BDGT SRCE	*ACN	*DCN	*FIN AMT.	*PLAN FY/Q	*FIN DATE	*FIN VEHICLE	*CONTRACTOR	*FUND PRTY STAT	*FIN NOTE	NA NO	AMND NO
Ⓚ	__	-	① P	② B	______	__ __ ③	300,000	④ 91/3	______	⑤ CAG	______ ⑥	NPL	⑦ 1 YEAR FED THEN STATE	____	_
	__	-	-	-	______	__ __	______	__	______	____	______	__	______	____	_
	__	-	-	-	______	__ __	______	__	______	____	______	__	______	____	_
	__	-	-	-	______	__ __	______	__	______	____	______	__	______	____	_

------------------------------ SUMMARY FMS FINANCIAL DATA ------------------------------

FIN BDGT SRCE	ACN	DCN	NET COMMIT AMOUNT	ORIG COMMIT DATE	FMS OPEN COMMIT	NET OBLIG AMOUNT	ORIG OBLIG DATE	NET OUTLAY AMOUNT	LAST OUTLAY DATE	FIN VEH	CONTRACTOR NAME/ OBLIGATING DOC NO
-	______	____		_/_/_			_/_/_		_/_/_	____	______

*CORE DATA ELEMENT OR CODE

ANY QUESTIONS? CALL CSC CERCLIS STAFF

ACTION:______(CSC ONLY)

* NOTE: The exhibit [illegible] SIF [illegible] SIF includes a second page [illegible] comments

V. REFERENCES

Regulations

Proposed Revisions to the National Oil and Hazardous Substances Pollution Contingency Plan, December 1988.

Guidance

OSWER Directive 9355.0-4A, "Superfund Remedial Design and Remedial Action Guidance" (June 1986).

OSWER Directive 9355.0-26, "Additional Clarification on Funding Ground or Surface Water Restoration Actions" (February 1989).

OSWER Directive 9320.2-03A, "Procedures for Completion and Deletion of National Priorities List Sites" (November 1988).

Contacts

Office of Emergency and Remedial Response (OERR), Hazardous Site Control Division (HSCD), Construction Management Branch, FTS 475-6707.

SITE COMPLETION/DELETION

I. DESCRIPTION OF ACTIVITY 1

- Introduction 1
- Types of Completions 1

II. PROCEDURES AND INTERACTIONS 2

- A. Site Completion Process: Site Close Out 2
  - Preparing Close Out Report 2
  - Technical Review Process for Close Out Report 3
- B. Close Out Reports for Different Types of Response Actions 3
  - Traditional Remedial Action 3
  - LTRA Sites 3
  - No Further Action Sites 4
  - No Action Sites 4
  - Removal Sites 4
  - Anticipated Findings 4
- C. Evaluation for NPL Site Deletion 5
- D. Site Deletion Process 5
  - Initiation Phase 6
    - State Consultation and Concurrence 6
    - Deletion Administrative Record (Deletion Docket) 6
    - Preparing the National and Local Notices of Intent to Delete 8
  - Public Notice and Comment Phase 8
  - Final Phase 8

III. PLANNING AND REPORTING REQUIREMENTS 10

IV. POTENTIAL PROBLEMS/RESOLUTIONS 11

- A. Negative Public Responses 11
- B. State Non-Concurrence 11
- C. Waste Left On Site 11

V. REFERENCES 12

- Policies 12
- Guidance 12
- Contacts 12

VI. ACTIVITY CHECKLIST 13

SITE COMPLETION/DELETION

I. DESCRIPTION OF ACTIVITY

Introduction

This chapter discusses the procedures an RPM follows when implementing the site completion/NPL deletion process at a Superfund remedial site. Completions are discussed in the first part of the chapter and the deletion process in the latter. More detailed information on site completions and NPL deletions can be found in OSWER Directive 9320.2-03A, "Procedures for Completion and Deletion of Sites from the National Priorities List (NPL)" (November 1988).

Types of Completions

Following the successful implementation of all appropriate remedial actions at a particular site, EPA Regional offices classify the site as either a "completion" (i.e., a deletion candidate) or as a "long-term response action" (LTRA).

"Site completion" is defined as the point at which no further remedial action is appropriate to protect public health and the environment. The following requirements must be met before a site can be classified as a "completion":

- Cleanup levels specified in the ROD have been achieved and all cleanup actions identified in the ROD have been successfully implemented;
- The site is protective of human health and the environment across all pathways of exposure;
- The constructed remedy is operational and functional and performing according to engineering design specifications; and
- The only activities remaining at the site are O&M activities to be provided or performed by the State or PRP.

LTRA is defined as activity at a site where all remedial actions have been implemented, but where a continued on-site presence is required for a period of time to achieve the levels of protection specified in the ROD or Action Memorandum. Following the achievement of the goals set forth in the ROD, the site is classified as a "completion." EPA Regional offices will identify sites as completions or LTRAs.

Both Headquarters and the State are given the opportunity to review and comment on the decision before the site is officially entered into CERCLIS as a completed or LTRA site. If the site is categorized as an LTRA, the RPM must ensure that an Interim Close Out report (discussed in the following section) is completed and approved. Completed sites and LTRAs may be placed in separate categories on the NPL.

II. PROCEDURES AND INTERACTIONS

A. Site Completion Process: Site Close Out

A close out report is prepared for every NPL site. The close out report describes how the site meets the technical and procedural completion requirements of Superfund sites. It is also used to support the Agency's intent to delete a site from the NPL. For Federal-lead and enforcement-lead sites, the close out report is prepared by the Region in consultation with Headquarters staff. For State-lead sites, close out reports may be written by the State and are subject to EPA Regional approval.

Assembling the close out report does not require either a large amount of time or effort. Information used in compiling the close out report is readily available from previous site activities. To keep the close out report brief, the RPM should reference previous technical documentation.

The close out report must be approved and signed by the Regional Administrator. Approval of the close out report signifies the end of Superfund cleanup activities at the site. However, State or PRP O&M activities continue as long as necessary.

Preparing Close Out Report

The report provides a brief technical determination that the conditions of the site comply with the ROD findings and design specifications and that activities performed at the site are sufficient to achieve protection of public health and the environment. The close out report also identifies any outstanding issues that might be of continued concern to either EPA or the involved community and explains why these issues do not preclude the site from completion. The exact format and contents of the close out report will vary depending upon the specific site. The Region should use its discretion in determining the level of detail necessary in the report to demonstrate the completion of activities at the site. The close out report should be prepared by the RPM (or appropriate State personnel) and should generally not exceed 10 to 15 pages in length.

The following components are addressed in the close out report:

- Summary of site conditions
- Demonstration of QA/QC on construction activities
- Confirmatory sampling and performance monitoring results
- Summary of O&M activities
- Assurance that protectiveness as specified in the ROD(s) has been achieved and that no further Superfund response is appropriate in order to protect human health and the environment
- Bibliography.

Technical Review Process for Close Out Report

The report receives peer review in the Region (or the State if the State drafted the close out report). After incorporating the revisions suggested by the peer review process, the RPM submits the report to appropriate Headquarters and State staff for review and comment. At the Headquarters level, OWPE, CERCLA Compliance Branch provides technical review of the report's content and conclusions for enforcement-lead sites. The Regional Coordinator for Design and Construction Activities (Design and Construction Management Branch, Hazardous Site Control Division, OERR) will review the close out report for Fund-lead and State-lead remedial sites. Regional coordinators within the Emergency Response Division, OERR will perform this role for removal sites.

After revising the close out report to reflect appropriate technical comments received from both Headquarters and State staff, the report must be submitted to the Regional Administrator for approval. Although Regions have the discretion of allowing the State to make revisions if the State has initiated the report, only the Regional Administrator has the authority to approve the final close out report. After the Regional Administrator signs and approves the close out report, the Region may begin to implement the site deletion process. Exhibit XI-1 illustrates the approval process for a close out report.

B. Close Out Reports for Different Types of Response Actions

A close out report is site-specific. Therefore, the technical content and format for a report will vary from site to site. There are five different types of response actions:

- Traditional remedial action
- LTRA sites
- No further action sites
- No action sites
- Removal sites.

Following is a brief description of the general information that should be included in close out reports for the different classifications of response actions.

Traditional Remedial Action

The close out report is completed following the successful implementation of the final operable unit at the site. It replaces the Remedial Action report described in OSWER Directive 9355.0-4A, "Superfund Remedial Design and Remedial Action Guidance" (June 1986). All confirmatory sampling and any assurance required to ensure that the remedy is operating as designed must be completed prior to approval of the close out report.

LTRA Sites

An Interim close out report is required before any site can be classified as LTRA. The data presented in the report determines whether the site will be placed in the LTRA category on the NPL. The close out report must:

- Demonstrate that construction activities at the site have been completed
- Provide a description of long-term actions to be conducted

311

- Identify the contaminant levels to be achieved.

LTRA sites require the continuation of remedial response actions. Therefore, the Interim close out report must be amended by the RPM to reflect the achievement of contaminant goals when LTRA activities are complete. The amended close out report describes monitoring results and specifies the type of continued O&M measures necessary to ensure protection of both public health and the environment.

No Further Action Sites

No further action sites include sites where expedited response actions or removal actions have been performed and the final operable unit ROD determines no additional cleanup activities are required to achieve protectiveness of public health and the environment. Many of the components of the close out report will have been addressed in the ROD (as part of the justification for no further action). Therefore, the RPM may reference any pertinent information contained in the ROD to satisfy the requirements of a close out report.

No Action Sites

Where the results of the remedial investigation indicate that no action is necessary, the close out report will be abbreviated, as components of the report pertaining to cleanup activities are not relevant. However, components of the ROD's justification for no action can be incorporated into the close out report. The RPM should reference any pertinent information contained in the ROD to satisfy the requirements of a close out report.

Removal Sites

At some sites, it may be possible to use removal authority to complete activity at the site. Since neither an RI/FS nor a ROD is required for these sites, the close out report assumes an added significance. In such cases, the On-Scene Coordinator (OSC) prepares the close out report and the report must provide adequate documentation that the activities performed at the site are sufficient to meet the completion requirements. The OSC report can be referenced to provide some of the necessary information.

Anticipated Findings

It is anticipated that a close out report will present the following findings:

- All hazards and pathways of exposure described in the NPL listing of the site have been adequately addressed

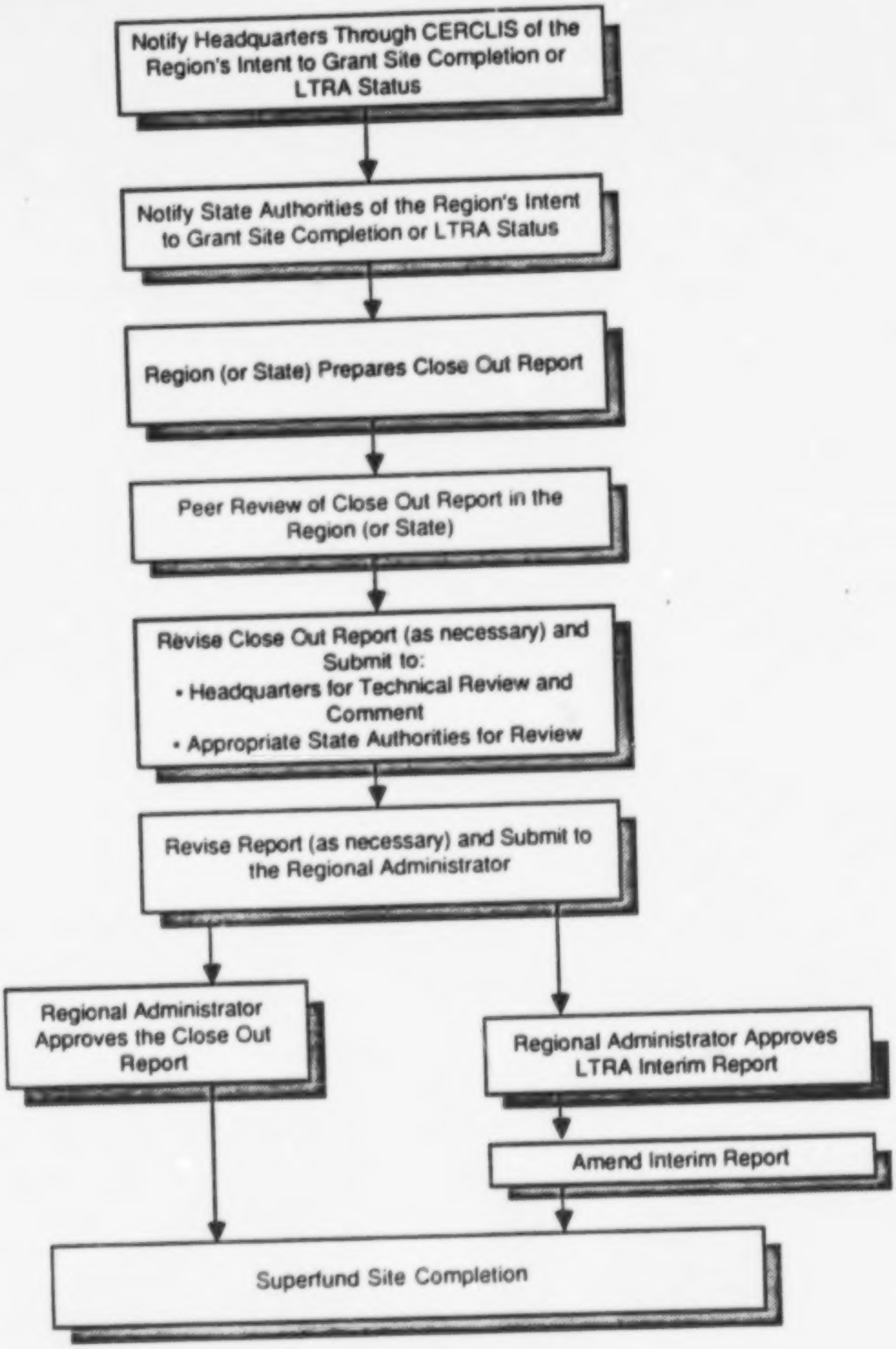
- The implemented remedy achieves the degree of cleanup or protection specified in the ROD(s) for all pathways of exposure, and no further response is appropriate in order to provide protection of public health and the environment

- All construction activities performed on site have been completed to design specifications; reference should be made to construction management and inspection reports, and other documents identifying acceptance of the work performed

- The levels of contamination at the site have been brought to within the levels specified in the ROD, and implemented remedies are performing at design specifications

Exhibit XI-1

Review and Approval Process for Close Out Report


Notify Headquarters Through CERCLIS of the Region's Intent to Grant Site Completion or LTRA Status
Notify State Authorities of the Region's Intent to Grant Site Completion or LTRA Status
Region (or State) Prepares Close Out Report
Peer Review of Close Out Report in the Region (or State)
Revise Close Out Report (as necessary) and Submit to:
• Headquarters for Technical Review and Comment
• Appropriate State Authorities for Review
Revise Report (as necessary) and Submit to the Regional Administrator
Regional Administrator Approves the Close Out Report
Regional Administrator Approves LTRA Interim Report
Amend Interim Report
Superfund Site Completion

- O&M specified for the site is in place, is guaranteed by the State or PRP, and is sufficient to maintain the effectiveness of the remedy
- The institutional controls necessary for the effective performance of the remedy are in place.

Since the close out reports are site-specific, the findings vary for each site. The RPM is expected to exercise his/her professional discretion in reaching findings appropriate for a particular site and to use available documentation of site activities as reference material.

C. *Evaluation for NPL Site Deletion*

Under section 300.66(c)(7) of the NCP[1] , sites can be deleted or recategorized on the NPL, in consultation with the State, if one or more of the following criteria are met:

- Responsible or other parties have implemented all appropriate response actions required by EPA
- All appropriate Fund-financed responses under CERCLA have been implemented and no further response by responsible personnel is appropriate
- Based on a remedial investigation, it is determined that the release poses no significant threat to human health or the environment and, therefore, taking remedial measures is not appropriate.

Under section 300.66(c)(8) of the NCP[2] , a deleted site is "...eligible for further Fund-financed remedial actions should future conditions warrant such action." Therefore, deleting a site from the NPL does not preclude the site's eligibility from subsequent Fund-financed or PRP actions. Future action can be taken at such sites without returning the site to the NPL. However, if it is determined that the site should be returned to the NPL, the site may be reinstated without re-scoring on the Hazard Ranking System (HRS). Furthermore, deletion does not affect cost recovery actions under section 107 of CERCLA.

D. *Site Deletion Process*

The deletion process begins after the Regional Administrator approves the close out report. Exhibit XI-2 provides an overview of the deletion process. The State and Local Coordination Branch of the Hazardous Site Control Division (HSCD) is responsible for Headquarters coordination of the procedures for deleting sites from the NPL. Regional and Headquarters technical personnel should work closely with the deletion coordinator to prepare the documents necessary to delete a site from the NPL.

The deletion process can be divided into three interrelated phases:

- Initiation phase

---

[1] This citation is from the 1985 NCP. The Proposed Revisions to the National Oil and Hazardous Substances Contingency Plan (December 21, 1988) citation is 300.425(e)(1).

[2] 300.425(e)3.

- Public notice and comment phase
- Final (deletion) phase.

Each phase is described below.

Initiation Phase

The initiation phase comprises three steps:

- RPM consults with appropriate State staff and obtains formal State concurrence
- RPM compiles the deletion Administrative Record (deletion docket)
- RPM prepares the national and local notice of intent to delete for Headquarters and RA approval.

The three steps of the initiation phase are discussed in greater detail below.

State Consultation and Concurrence

Regions initiate the deletion process by consulting with the State and requesting the State's concurrence on EPA's intent to delete a site. In some instances, the State may initiate this process by specifically requesting the deletion of a site. No site may be deleted without State concurrence.

Deletion Administrative Record (Deletion Docket)

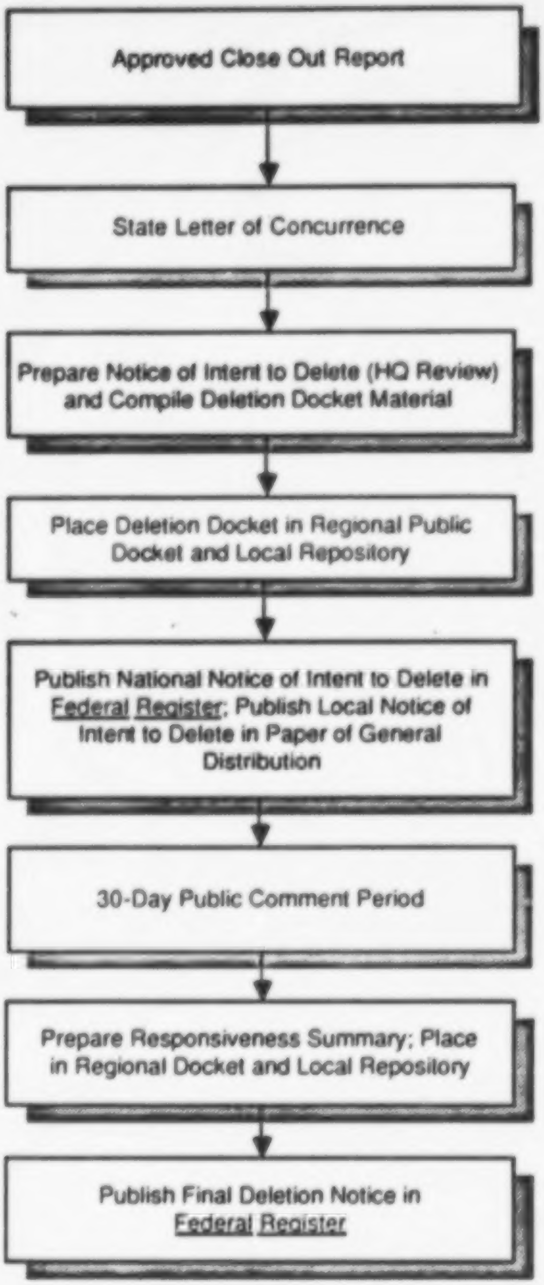
The deletion Administrative Record of the Agency's decision to delete a site from the NPL is referred to as the "deletion docket." It contains all pertinent information supporting the Region's deletion recommendation. The deletion docket is not a continuation of the site's Administrative Record for remedy selection; however, documents that are contained in the Administrative Record for remedy selection can be referenced and do not have to be duplicated in the deletion docket (provided the Administrative Record for remedy selection is still available to the public). Headquarters staff are available to assist the Regions in preparing the deletion docket or in resolving any outstanding issues regarding the site's deletion.

The deletion docket is made available to the public at the Regional public docket and at a local repository. The public has an opportunity to review the deletion docket during the comment periods that follow publication of the national and local notices of intent to delete. RPMs should work with their Superfund community relations staff to ensure that complete copies of the deletion docket are placed in appropriate Regional and local repositories. The deletion docket is not maintained at Headquarters. Therefore, no docket material should be submitted to Headquarters.

The documents necessary to support the deletion docket vary depending on the type of response (remedial action, removal action, no action) and the lead organization (Fund-

Exhibit XI-2

The Deletion Process


Approved Close Out Report
State Letter of Concurrence
Prepare Notice of Intent to Delete (HQ Review) and Compile Deletion Docket Material
Place Deletion Docket in Regional Public Docket and Local Repository
Publish National Notice of Intent to Delete in Federal Register; Publish Local Notice of Intent to Delete in Paper of General Distribution
30-Day Public Comment Period
Prepare Responsiveness Summary; Place in Regional Docket and Local Repository
Publish Final Deletion Notice in Federal Register

lead, enforcement, State-lead). The following represents a suggested list of documents to be included in a deletion docket:

- RI report
- FS report
- ROD (or equivalent) for each operable unit
- Consent decree
- Action Memorandum
- Community Relations Plans
- Superfund State Contract
- Cooperative Agreements
- Agreements with PRPs
- Design plans and specifications
- Construction inspection reports
- Construction final report
- OSC report
- Documentation of State concurrence
- Operation and maintenance plan
- Close Out Report
- Transcripts of Public Meetings
- Responsiveness summary for notice of intent to delete
- Bibliography of documents.

The above list is not intended to be complete. RPMs should exercise their professional discretion when deciding what supporting documents to include in the deletion docket.

Preparing the National and Local Notices of Intent to Delete

The RPM submits draft notices of intent to delete to the Regional Administrator for approval. At a minimum, the Federal Register (national) notice and the local notice should contain the following sections:

- An announcement of intent to delete
- Requests for public comments during a 30-day period
- The name and address of a Regional contact to whom comments may be sent
- The location(s) of the deletion docket
- The name and address of a Regional contact who can answer questions and provide additional information

In addition, the national notice should contain supplementary information on NPL deletion criteria, deletion procedures and the basis for intended site deletions. Specific guidance for preparing the national notice is contained in OSWER Directive 9320.2-3A, "Procedures for Completion and Deletion of National Priorities List (NPL) Sites" (November 1988).

Public Notice and Comment Phase

The Regional Superfund Community Relations Coordinator should prepare and distribute the local notice of intent to delete. This statement should be published in local newspapers of general circulation and distributed to State, local, and community officials; appropriate Federal agencies (e.g., the Agency for Toxic Substances and Disease Registry, the National Response Team, and the U.S. Coast Guard); enforcement personnel from the Office of Regional Counsel (ORC); and local repositories.

In addition, the ORC should inform the State Attorney General and other interested State agencies, Federal and State courts, and the U.S. Department of Justice.

The RPM should work with the Regional Superfund Community Relations Coordinator to ensure that the local notice has been distributed to all appropriate recipients.

Final Phase

In the final phase of the deletion process, the RPM is responsible for preparing the responsiveness summary, and a draft Federal Register notice to announce the deletion.

The responsiveness summary serves two functions:

- Documents the manner in which EPA considered and responded to the public comments
- Provides the Agency with information about the interested community's concerns regarding EPA's intent to delete a site.

RPMs are responsible for preparing responsiveness summaries of national and local comments. The State and Local Coordination Branch of HSCD will assist the Regions in preparing responses when appropriate.

A responsiveness summary describes the following:

- Comments received during the national and local comment periods
- Comments from public meetings (if any)
- Responses from the Region to all national and local comments.

The responsiveness summary must be approved by the Regional Administrator. A copy of the approved summary must be included in the deletion docket and local repository.

The Regional Administrator will then publish the notice of deletion in the Federal Register.

III. PLANNING AND REPORTING REQUIREMENTS

Upon completion of all remedial activity, the RPM should ensure that the accomplishment is entered into CERCLIS for SCAP and SPMS reporting purposes. This information will be used to evaluate Regional progress toward meeting SCAP and SPMS targets. Projections of site completions/deletions are made on a program-specific basis for resource allocation purposes.

RPMs are responsible for ensuring that an accurate CERCLIS site information form (SIF) is completed for site deletion. Exhibit XI-3 provides an example of a completed SIF for site deletion. The RPMs should complete the SIF using the sample outline of fields and values:

A. Operable Unit (00, site deletions occur per site, not for an individual operable unit)
B. Event (ND = NPL Deletion)
C. Lead (F = Fund)
D. Plan start/completion date (FYQ)
E. Actual start/completion date (MM/DD/YY)
F. Event Start NPL Indicator (Y/N)
G. Financial Requirements:

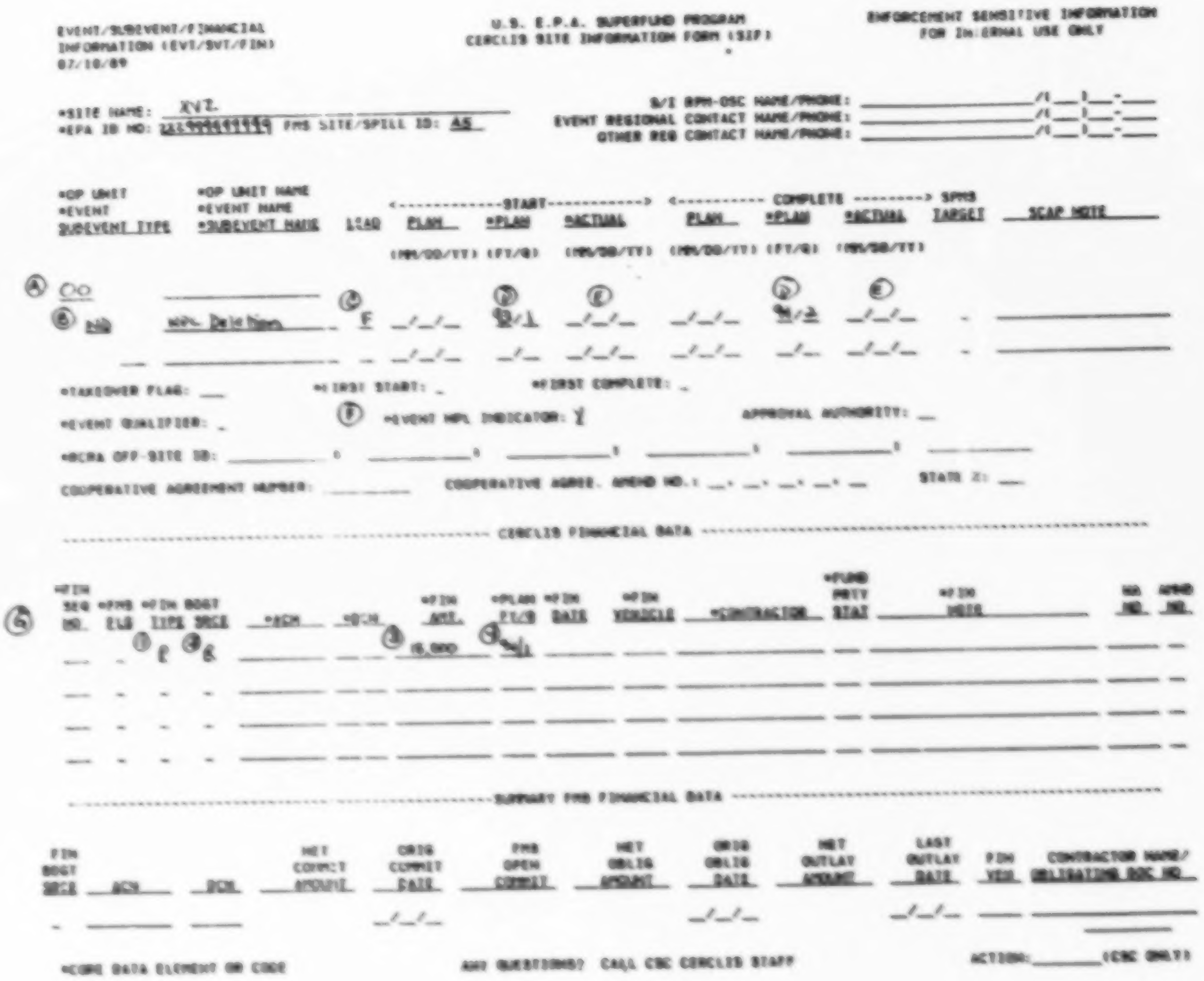
  1. Financial Type (P = Planned Obligation)
  2. Budget Source (R = Remedial)
  3. Financial Amount
  4. Plan/Actual Financial Date (FYQ, MM/DD/YY)

The NPL deletion process is initiated when the RPM reviews the performance monitoring of the completed remedy for the site, verifies the integrity of the remedial action, and concludes that no further action is required at the site.

The Region receives credit for a deletion when a notice of intent to delete the site is published in the Federal Register.

Exhibit XI-3

Sample SIF for Site Deletion



EVENT/SUBEVENT/FINANCIAL
INFORMATION (EVT/SVT/FIN)
07/10/89

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS SITE INFORMATION FORM (SIF)

ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
*EPA ID NO: [illegible] FMS SITE/SPILL ID: AS

S/I RPM-OSC NAME/PHONE: ______/(__)__-__
EVENT REGIONAL CONTACT NAME/PHONE: ______/(__)__-__
OTHER REG CONTACT NAME/PHONE: ______/(__)__-__

*OP UNIT *EVENT SUBEVENT TYPE	*OP UNIT NAME *EVENT NAME *SUBEVENT NAME	LEAD	START PLAN (MM/DD/YY)	START *PLAN (FY/Q)	START *ACTUAL (MM/DD/YY)	COMPLETE PLAN (MM/DD/YY)	COMPLETE *PLAN (FY/Q)	COMPLETE *ACTUAL (MM/DD/YY)	SPMS TARGET	SCAP NOTE
Ⓐ CO										
Ⓑ NB	NPL Deletion	Ⓒ F	__/__/__	Ⓓ 92/1	Ⓔ __/__/__	__/__/__	Ⓓ 92/2	Ⓔ __/__/__	-	
__		_	__/__/__	__/__	__/__/__	__/__/__	__/__	__/__/__	-	

*TAKEOVER FLAG: __ *FIRST START: _ *FIRST COMPLETE: _

*EVENT QUALIFIER: _ Ⓕ *EVENT NPL INDICATOR: Y APPROVAL AUTHORITY: __

*RCRA OFF-SITE ID: ______, ______, ______, ______, ______, ______

COOPERATIVE AGREEMENT NUMBER: ______ COOPERATIVE AGREE. AMEND NO.: __, __, __, __, __ STATE %: __

CERCLIS FINANCIAL DATA

Ⓖ *FIN SEQ NO.	*FMS FLG	*FIN TYPE	BDGT SRCE	*ACN	*DCN	*FIN AMT.	*PLAN FY/Q	*FIN DATE	*FIN VEHICLE	*CONTRACTOR	*FUND PRTY STAT	*FIN NOTE	NO. NO.	AMND NO.
__	Ⓗ _	E	Ⓘ B			Ⓙ 15,000	Ⓚ 92/1							
__	-	-	-											
__	-	-	-											
__	-	-	-											

SUMMARY FMS FINANCIAL DATA

FIN BDGT SRCE	ACN	DCN	NET COMMIT AMOUNT	ORIG COMMIT DATE	FMS OPEN COMMIT	NET OBLIG AMOUNT	ORIG OBLIG DATE	NET OUTLAY AMOUNT	LAST OUTLAY DATE	FIN YEO	CONTRACTOR NAME/ OBLIGATING DOC NO.
-				__/__/__			__/__/__		__/__/__		

*CORE DATA ELEMENT OR CODE

ANY QUESTIONS? CALL CSC CERCLIS STAFF

ACTION:______(CSC ONLY)

IV. POTENTIAL PROBLEMS/RESOLUTIONS

A. Negative Public Responses

If public comments indicate strong disagreement with the recommendation, the responsiveness summary should provide justification for proceeding with the deletion. If the public comments address issues of national concern, RPMs can receive assistance from the HSCD Deletion Coordinator in preparing appropriate responses.

B. State Non-Concurrence

No site may be deleted from the NPL without the State's concurrence. Therefore, the absence of this concurrence will prevent the site's deletion from the NPL. The RPM should work closely with the State Project Officer (SPO) to resolve any problems that may exist. If the RPM cannot effectively address the problems, the RPM should consult with appropriate Regional and Headquarters management.

C. Waste Left On Site

The fact that quantities of waste may be left on site does not preclude completion status so long as the Agency, in consultation with the State, determines that the remaining waste does not pose a significant threat to public health or the environment. To reach this determination, the RPM must be able to demonstrate to Regional management that the implemented remedy achieved an adequate level of protectiveness.

V. REFERENCES

Policies	"Proposed Revisions to NCP" (December 21, 1988).
Guidance	OSWER Directive 9320.2-3A, "Procedures for Completion and Deletion of Sites from the National Priorities List (NPL)" (November 1988).
Contacts	Office of Emergency and Remedial Response (OERR), Hazardous Site Control Division, Design and Construction Management Branch, FTS 475-6707. Office of Waste Programs Enforcement (OWPE) CERCLA Enforcement Division, Compliance Branch, FTS 382-4819.

VI. ACTIVITY CHECKLIST

This section provides a checklist for the RPM to refer to during the completion/deletion process. The checklist is not intended to present an exhaustive set of procedures. RPMs should exercise their professional discretion when deciding what procedures are appropriate for a particular site.

1)_____ Consult with appropriate Headquarters staff member of the Office of Waste Programs Enforcement (OWPE) or Office of Emergency and Remedial Response (OERR) on site completion.

2)_____ Initiate confirmatory sampling and monitoring as described in the ROD(s).

3)_____ Perform technical evaluations of data generated from performance monitoring and confirmatory sampling.

4)_____ Draft close out report using information from previous site activities and referring to previous technical documents.

5)_____ After the Regional Administrator approves and signs the close out report, initiate the deletion process.

6)_____ In consultation with appropriate EPA and State staff, determine whether the site meets at least one of the NPL deletion criteria listed in 40 C.F.R. (§ 300.66(C)(7).

7)_____ Consult with appropriate State staff and obtain formal State concurrence with EPA's intent to delete.

8)_____ Begin preparing the deletion docket (i.e., the Administrative Record of EPA's decision to delete a site from the NPL).

9)_____ Draft Federal Register (i.e., national) notice of intent to delete for the Regional Administrator's approval and the AA, OSWER's concurrence.

10)_____ Draft local notice of intent to delete. The notice should summarize the information contained in the national notice.

11)_____ Complete the deletion docket.

12)_____ Publish the notice of intent to delete in the Federal Register and local newspaper of general circulation.

13)_____ Collect and assemble all public comments.

14)_____ Prepare responsiveness summary.

15)_____ Prepare a draft Federal Register notice to announce the deletion of the site(s) from the NPL. Notice should provide a summary of comments received concerning national and local notices of intent to delete. Notice also should include the responsiveness summary.

16)_____ Region publishes the notice of deletion in the Federal Register.

COST RECOVERY

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
Cost Recovery for Conventional Removals 1
Cost Recovery for Sites in the Remedial Process 2
    Cost Recovery in Context of RD/RA Negotiations 2
    Case Referral 3
Recovery of Oversight Costs 3

II. PROCEDURES AND INTERACTIONS 5

A. PRP Liability 5
    Elements of Liability 5
    Standard of Liability 6
    Scope of Liability -- Joint and Several 6
    Defenses 7
B. PRP Searches 7
C. Cost Recovery Strategy 8
    Prioritization of Cases 8
    Timing 9
    Decision Not To Pursue Cost Recovery 10
    Close-out Memorandum 10
D. Notification and Demand Requirements 10
    Special Notice Letters 11
    Demand Letters 11
    Types of Costs and Pre-Judgment Interest 11
E Documentation Requirements 12
    Types of Expenditures 13
    EPA Indirect Costs 13
    Evidence 13
    Cost Summaries 14
F. Documentation Procedures 16
    Regional Cost Documentation Procedures 16
    OWPE Cost Documentation Procedures 17
    FMD Cost Documentation Procedures 18
    DOJ Cost Documentation 18
G. Judicial Cost Recovery 18
    Referral Package 18
    Litigation Support 19
    Litigation Management Plan 20
H *De Minimis* Settlements 20
    Necessary Information 20
    Release From Liability and Reopeners 21
I Administrative Settlements 21
J. Enforcing Settlements 22
K. Arbitration 22

L. Mixed Funding 22
M. Bankruptcy Actions 22
  Statutory Background 23
  Proof of Claim 23
  Environmental Claims as Priorities 24

III. PLANNING AND REPORTING REQUIREMENTS 25

A. Planning 25
B. Budgeting 25
C. Reporting Requirements 25

IV. REFERENCES 28

Regulation 28
Policies 28
Guidance 28
Manuals 29
Contacts 29

APPENDIX

COST RECOVERY

I DESCRIPTION OF ACTIVITY

Introduction

When the Agency uses Fund monies for a response action at a site where there are financially viable PRPs, it is authorized to take an enforcement action against those PRPs to recover its costs. This action, under section 107 of CERCLA, is known as a cost recovery action. Cost recovery can be pursued for the costs of conventional removal, Remedial Investigation/Feasibility Study (RI/FS), Remedial Design (RD) and Remedial Action (RA), including EPA's costs of overseeing PRP responses. The enforcement actions taken may include issuance of demand letters, negotiations with PRPs, arbitration, administrative settlement, judicial settlement, and litigation.

This chapter provides RPMs/OSCs with an overview of the central components of cost recovery actions. The information is organized to follow the chronology of tasks that an RPM/OSC manages in a cost recovery action.

There are two major types of cost recovery actions:

- Cost Recovery for Removals
- Cost Recovery for Remedials.

Also, as part of each type of cost recovery action, EPA may recover oversight costs. Many cost recovery cases are not limited to one type of cost, but include both remedial and removal costs and may include oversight costs for some portions of the response actions. In such cases, documents relevant to all aspects of the case must be compiled. Each of these types of cost recovery actions is discussed briefly below and Exhibit XII-1 presents a graphic description of the process of each type of action.

Cost Recovery for Conventional Removals

During the course of the conventional removal action, the OSC is responsible for compiling the Administrative Record with assistance from Regional Counsel and Administrative Record Coordinators, obtaining information on the identities of PRPs, and documenting the removal work undertaken and the costs incurred. As the removal is completed, the OSC is responsible for completing the PRP search information. After the removal is completed and the OSC files the final report for the action, the Agency must decide whether or not to pursue cost recovery for its expenses. In selecting which sites to pursue, the Agency places a higher priority on sites where more than $200,000 was spent on the removal action. If the Agency decides to proceed with cost recovery, three parallel activities are conducted: (1) assure that the liability information collected in the PRP search meets evidentiary standards, (2) document the costs of the removal action, and (3) review the compilation of the administrative record.

Once the Agency's costs have been documented and the PRPs are reasonably well identified, EPA sends demand letters to the PRPs. The demand letters notify the PRPs of their liability for the Agency's cleanup costs and demand payment of the full costs of cleanup. In a limited number of situations, the PRPs will respond to the demand letters by reimbursing the Agency immediately for its costs. However, in most situations, the

PRPs will seek to negotiate with the Agency over the extent of their liability or the costs incurred. If these negotiations result in a settlement, EPA and the PRPs may enter into an administrative order on consent that requires the PRPs to reimburse the Agency for its costs. If the total response costs at the site exceed $500,000 (excluding interest), the Department of Justice (DOJ) must concur on the terms of the settlement.

If the PRPs refuse to reimburse EPA for these costs, the Region will decide whether to refer the case to DOJ to recover the money. When deciding whether to initiate a judicial action, the Region reviews the case's priority and all available evidence and evaluates the likely success of cost recovery efforts for that particular site. If the Region decides to initiate the suit, the case will be referred to DOJ. In general, cost recovery cases involving post-SARA removals (except those with section 104(c)(1)(C) waivers) must be filed within a statute of limitations date of three years from completion of the removal.

Cost Recovery for Sites in the Remedial Process

Cost recovery activities at sites in the remedial process are a function of past expenditures for removals, RI/FS or RD, the outcome of RD/RA negotiations, and timing concerns related to possible statute of limitations dates. When EPA incurs cleanup costs at a remedial site, there are five contexts in which it may recover its costs. First, if the Agency funds a removal or the RI/FS and the PRPs agree to perform the RD/RA, the Agency may recover the costs of the removal and RI/FS from the PRPs as a part of the RD/RA settlement. Second, if the Agency funds a removal or the RI/FS and one group of PRPs agrees to perform the RD/RA but there is another group of viable PRPs that does not settle for the RD/RA, the Agency may sue the non-settlors separately for its RI/FS costs. Third, if the Agency funds the RD/RA because there was no settlement, it may seek to recover the costs of the entire response in a cost recovery action, which should be developed at the commencement of remedial construction. Fourth, where the time between the completion of a removal, RI/FS or RD and the initiation of on-site construction is likely to exceed three years, EPA will file for cost recovery regarding the removal and/or RI/FS and/or RD costs and later amend the suit to add the costs of the RA. Finally, where there are multiple remedial operable units, EPA will pursue a cost recovery action at the first operable unit to recover its costs and to obtain a declaratory judgment on liability for its costs at the subsequent operable units. EPA then will bring subsequent actions for its costs at the other operable units as they are incurred. The program operates on the assumption that there may be different statute of limitations dates for different operable unit activities.

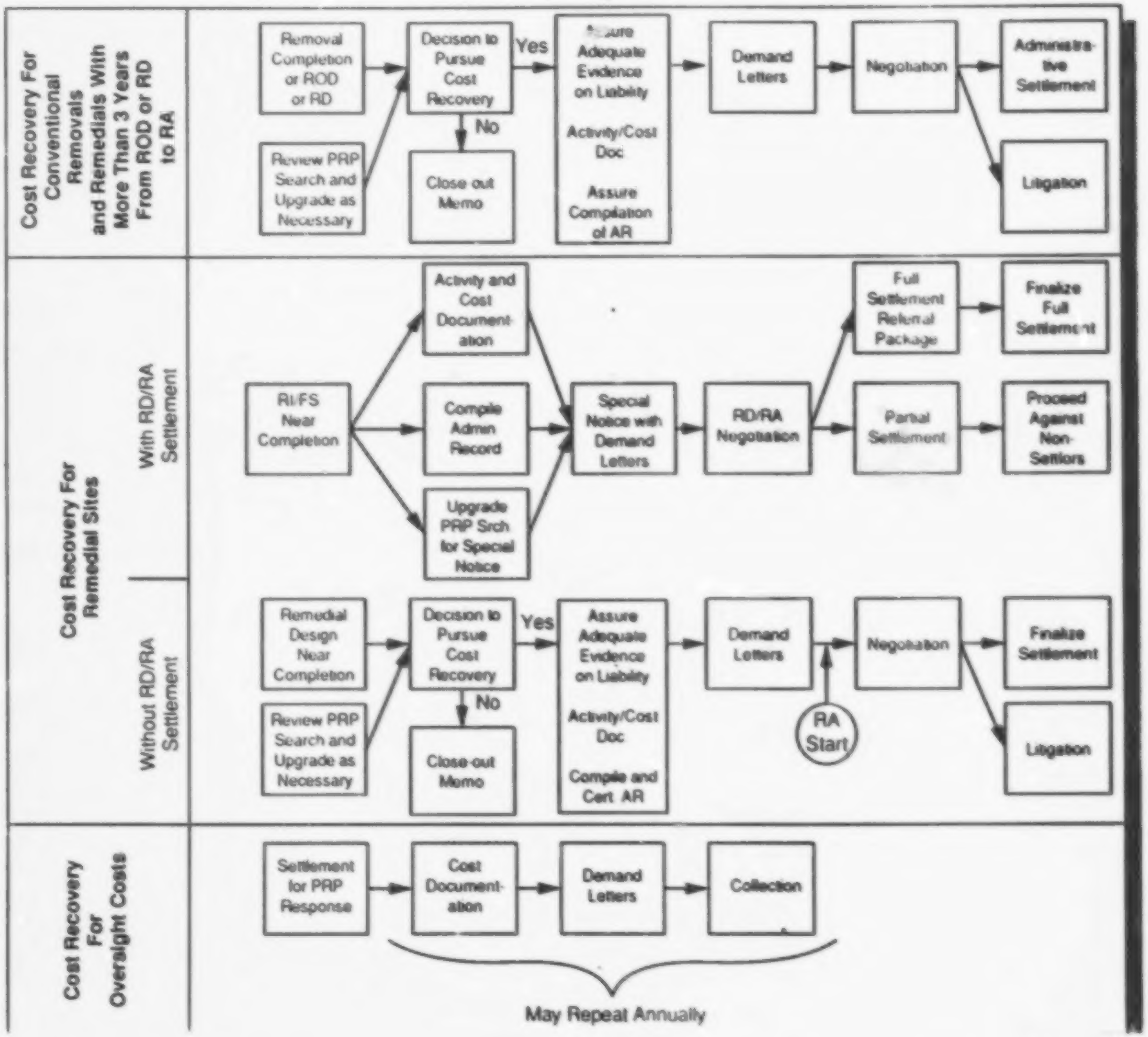
Cost Recovery in Context of RD/RA Negotiations

In general, the process for recovering the costs of activities during the remedial response is similar to that used to recover removal costs. However, because the Agency may be seeking either the costs of a removal or the RI/FS, the RD/RA, or several responses, the timing of these activities may vary. When the Agency negotiates with the PRPs to perform the RD/RA at the site, the RI/FS costs will be pursued as part of the overall negotiations. If, however, the Agency is pursuing remedial response costs separately from a settlement for RD/RA, separate cost documentation and demand letters will be required. Refer to Chapter VII, RD/RA Negotiations for a more-detailed discussion of the process of RD/RA negotiations.

The RPM, in conjunction with the ORC and the civil investigator, is responsible for five major pre-litigation activities involved in remedial cost recovery that can be performed

Exhibit XII-1

Cost Recovery Process


Cost Recovery For Conventional Removals and Remedials With More Than 3 Years From ROD or RD to RA
Removal Completion or ROD or RD
Review PRP Search and Upgrade as Necessary
Decision to Pursue Cost Recovery
Yes
No
Close out Memo
Assure Adequate Evidence on Liability
Activity/Cost Doc
Assure Compilation of AR
Demand Letters
Negotiation
Administrative Settlement
Litigation
Cost Recovery For Remedial Sites
With RD/RA Settlement
RI/FS Near Completion
Activity and Cost Documentation
Compile Admin Record
Upgrade PRP Srch for Special Notice
Special Notice with Demand Letters
RD/RA Negotiation
Full Settlement Referral Package
Finalize Full Settlement
Partial Settlement
Proceed Against Non-Settlors
Without RD/RA Settlement
Remedial Design Near Completion
Review PRP Search and Upgrade as Necessary
Decision to Pursue Cost Recovery
Yes
No
Close-out Memo
Assure Adequate Evidence on Liability
Activity/Cost Doc
Compile and Cert. AR
Demand Letters
RA Start
Negotiation
Finalize Settlement
Litigation
Cost Recovery For Oversight Costs
Settlement for PRP Response
Cost Documentation
Demand Letters
Collection
May Repeat Annually

concurrently and usually occur near the time that the ROD is signed. These activities are:

- Ensure that the PRP-liability information meets evidentiary standards
- Complete and certify the Administrative Record
- Document the removal, remedial, and oversight activities undertaken and the costs of these responses
- Send demand letters either as part of special notice letters or separately
- Negotiate with the PRPs about their liability and the extent of EPA's costs.

If this process is successful and the PRPs agree to reimburse the Agency for its costs, the settlement usually will result in a consent decree.

Case Referral

If the PRPs do not agree to either perform the RD/RA or reimburse the Agency's costs, EPA will develop a case to sue some or all of the PRPs depending on their liability and financial viability, the universe of PRPs, and their contributions. This case, developed at the time the remedial action starts, will seek to recover EPA's past and future costs, plus interest. The first step in this process is to prepare a referral package. The case team prepares the case for referral to DOJ. The team is charged with assembling all pertinent facts and documents concerning the response decision and underlying record; PRP liability, defenses and viability; and response activities and costs into a litigation referral package. Assembling cost documentation will require the case team to coordinate their efforts with Regional financial personnel, and the Financial Management Division (FMD) and OWPE. The final product of the case team's work is a referral package.

The completed direct referral package is sent to DOJ for litigation. As DOJ develops the case, members of the case team will be called upon to perform litigation support activities. This may involve support activities ranging from consultation with the case attorneys on technical aspects of response authorization, to time consuming involvement in complex litigation, to testimony in court. The RPM/OSC also must budget and manage litigation support contractors, and can expect to be called upon to provide his/her technical expertise to help prosecute the cost recovery case.

Recovery of Oversight Costs

EPA may recover its costs when the PRPs perform a removal or remedial action and the Agency incurs costs in overseeing that action. Where the response action is an RI/FS, section 104 of CERCLA requires that the PRPs reimburse the Agency for these costs. In other contexts, this reimbursement of oversight costs is required by EPA policy. The agreement to pay EPA's oversight costs will generally be a part of the settlement document for the PRP's response action. That document should specify what the Agency must give the PRPs to prove its costs, such as a standard report from the Integrated Financial Management System, and how often the PRPs will reimburse the Agency. PRPs often reimburse the Agency on a semi-annual or annual basis. Where the consent order for an RI/FS or consent decree for RD/RA specifies the cost categories and documentation to be provided by EPA with billings, the documentation process should include fewer disputes than where the settlement document is not specific.

References

OSWER Directive 9832.13, "The Superfund Cost Recovery Strategy" (July 1988).

OSWER Directive 9832.11, "Guidance on Documenting Decisions Not to Take Cost Recovery Actions" (June 1988).

OSWER Directive 9832.0-1A, "Procedures for Documenting Costs for CERCLA section 107 Actions" (January 1985).

OSWER Directive 9832.1, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980" (August 1983).

OECM, "Model Ligitation Report for CERCLA §106 and §107 and RCRA §7003 Actions" (June 21, 1989).

II. PROCEDURES AND INTERACTIONS

CERCLA establishes the liability of responsible parties for the costs the government incurred when responding to a release of hazardous substances. There are three key statutory provisions:

- Section 107 of CERCLA authorizes the Agency to seek cost recovery and prejudgment interest through judicial action.
- Section 122 of CERCLA establishes conditions on settlements.
- Section 122(h) of CERCLA authorizes the Agency to enter into administrative settlements with PRPs, but requires DOJ approval when the total response costs at the site exceed $500,000. The authority to settle cost recovery cases administratively was delegated to the Regional Administrators by Delegation 14-14-D (Sept. 21, 1987). Section 122(h)(3) of CERCLA provides the Agency with the necessary authority to enforce these settlements.

The Agency's cost recovery strategy emphasizes negotiating administrative settlements whenever possible and litigating only when necessary. The Regions have been delegated the authority to enter into administrative settlements.

This section of the chapter discusses the following subjects that are relevant to the cost recovery process:

A. PRP Liability
B. PRP Searches
C. Cost Recovery Strategy
D. Notification and Demand Requirements
E. Documentation Requirements
F. Documentation Procedures
G. Judicial Cost Recovery Actions
H. De minimis Settlements
I. Administrative Settlements
J. Enforcing Settlements
K. Arbitration
L. Mixed Funding
M. Bankruptcy

Each is presented below.

A. *PRP Liability*

This section discusses the nature of PRP liability for EPA's response costs. It describes the elements of a cost recovery case, the standard of liability that applies, the scope of the PRP's liability, and the categories of PRPs that are liable.

Elements of Liability

Under section 107(a) of CERCLA, the Federal government can file suit in Federal district court to obtain reimbursement for response costs. To prove its claim for cost recovery, the government must establish that:

- The site is a facility
- There was either an actual or threatened release of a hazardous substance from the facility
- EPA incurred costs as a result of this actual or threatened release
- The defendant falls within one of the four categories of PRPs. These are:
    - Current owners or operators of facilities or vessels
    - Owners or operators of a facility at the time hazardous substances were disposed of
    - Persons who arranged for treatment or disposal of hazardous substances that went to the site, e.g. generators
    - Persons who accepted hazardous substances for transport to disposal or treatment sites of their selection.

Proof of liability may be more complex at old sites with limited documentation. For example, the PRP search includes obtaining evidence that the generators materials were sent to the site, and contained hazadous substances. Further information on elements of liability is contained in Chapter IV, PRP Search, Notification and Information Exchange.

Standard of Liability

Section 107 of CERCLA imposes strict liability on those who are in one of the four classes of parties described in section 107(a), rather than a negligence standard. This means that PRPs are liable even if: the problems caused by the hazardous substance release were unforeseeable; the PRP acted in good faith; or state-of-the-art waste management practices were used at the time the materials were disposed. One of the most significant aspects of CERCLA is that the PRPs are liable for both their past and present waste management practices.

Scope of Liability -- Joint and Several

The courts have interpreted CERCLA to impose joint and several liability on PRPs where two or more PRPs cause a harm that is indivisible, such as in the case of commingled wastes. Under joint and several liability, each PRP can be held individually liable for all of the costs of cleanup of a site, regardless of the amount of waste that PRP sent to the site. Under this legal doctrine, the Agency may choose which PRPs to sue. The Agency does not have to sue all PRPs involved at a particular site. If EPA's suit against the named PRPs is successful, those PRPs are liable for the entire cost of all response activities.

When the Agency recovers the cost of the response action from the named PRPs, those PRPs may seek contribution from other PRPs. When PRPs bring a contribution action, they seek to recover a share of the judgment from other persons who were involved at the site, but were not sued by EPA. The Agency should not be involved in any contribution action brought by the named PRPs.

Defenses

Section 107(b) of CERCLA enumerates defenses that may be asserted by PRPs in any cost recovery action. If RPMs/OSCs have any knowledge of a defense that a PRP may raise, the RPM should advise the Office of Regional Counsel (ORC).

Consistent with CERCLA's strict liability standard, three defenses are available that will keep a PRP from being held liable for the Agency's costs. The defendant has a defense if it establishes that the release was caused solely by:

- An act of God as defined in section 101(1) of CERCLA
- An act of war, or
- A third party other than one in a contractual relationship with the defendant, if the defendant establishes that he exercised due care and took precautions against foreseeable acts and omissions of such third party. A subset of this defense is the innocent landowner (purchaser) defense in section 101(35) of CERCLA.

The Agency's right to recover costs is also limited by the requirement that the response costs are "not inconsistent with the national contingency plan (NCP)." The PRPs bear the burden of proving that the Agency's response costs are inconsistent with the NCP.

B. PRP Searches

The purposes of a PRP search include collection of evidence of the PRPs' liability and financial viability. In cases where the PRPs fail to conduct the response activity and do not agree to reimburse the government's costs, PRP searches provide much of the evidence of a PRP's liability that will be used in future litigation.

The PRP search includes the collection and analysis of information about each PRP's connection to the site. The information collection includes title searches, a review of existing documentation such as waste manifests, responses to CERCLA section 104(e) information requests, interviews with knowledgeable parties, and analyses of waste-in information. A PRP search report is developed from this information, which describes in detail each PRP's involvement with the site and the evidence that proves that involvement.

The PRP search is a fundamental component of a response action. The exigencies of the particular site and the value of the response action dictate the scope of the initial PRP search. The search should be initiated as early as possible to develop a site-specific enforcement strategy. The PRP search generally continues during the response activity at a site. Supplemental work may be necessary for cost recovery.

PRP searches are discussed in detail in Chapter IV, PRP Search, Notification, and Information Exchange.

References

OSWER Directive 9834.6, Potentially Responsible Party Search Manual (August 1987).

OSWER Directive 9834.3-2a, "PRP Search Supplemental Guidance for Sites in the

Superfund Remedial Program" (June 16, 1989).

C. *Cost Recovery Strategy*

EPA's cost recovery strategy sets forth the Agency's priorities for cost recovery and the steps that each response action must go through toward settlement, litigation, or site close-out.

Prioritization of Cases

Once a response activity has been identified as a candidate for judicial action, Regional management prioritizes the case to ensure that Regional resources are efficiently used to meet the objectives of the cost recovery program, which are:

- Maximize return of revenue to the Trust Fund
- Initiate enforcement activity within strategic time frames, but no later than the date defined by the applicable statute of limitation
- Encourage PRP settlement
- Use administrative authority and dispute resolution procedures.

OSWER has developed national case selection criteria for sites with financially viable PRPs based on the amount of money expended at the site and the cost recovery potential. Based on these criteria, the priorities for initiating cases are:

- NPL and non-NPL sites where EPA has completed a removal action (including expanded removal actions, RI/FSs, and initial remedial measures), the response costs are $200,000 or greater, and the statute of limitations deadline is approaching.
- Cases where Fund-financed remedial design and action have been initiated. A remedial case referral to DOJ should be scheduled for every site in this category.
- Sites where there has been a partial settlement providing the Agency with less than full relief and there are viable non-settlors.
- NPL or non-NPL sites where EPA has completed a removal action and the costs of response are $200,000 or greater. Depending upon resources, referrals to DOJ on these sites should occur no later than twelve months after the completion of the removal action.
- Sites where total response costs are less than $200,000.

In addition to these five priorities, the Agency will pursue cost recovery against PRPs that are undergoing bankruptcy proceedings in limited circumstances. Bankruptcy referrals pose a difficult problem for four reasons: lack of PRP unencumbered resources, time constraints, EPA resource limitations, and lack of information. RPMs should work closely with the Regional attorneys and OECM's National Project Branch to resolve any bankruptcy issues.

Timing

Based upon experience, EPA prefers to focus its energies on completing conventional removals before turning to cost recovery. At sites in the remedial pipeline, EPA prefers to have selected the remedy (i.e., the Agency knows what should be done at the site) and, if the RA is funded, to have started construction before engaging in litigation. In selecting candidates for cost recovery, a conventional removal (not including an RI/FS) may be ready for referral when it is completed. A remedial is ready for referral when on-site construction of the RA is initiated. RI/FS response costs are pursued as part of RA cost recovery, unless the RA will not begin within three years from the ROD, in which case the RI/FS costs should be sought within three years from the ROD.

Cost recovery actions for conventional removals should be referred to DOJ as soon as possible after the action has been completed, ideally not later than one year after the completion date. Cost recovery actions for remedial responses should be developed for filing at the time of initiation of physical on-site construction of the RA. RPMs/OSCs should anticipate that it takes at least two quarters to prepare a referral package.

RPMs/OSCs must be aware of statutory time limits for filing cost recovery actions. Under section 113(g) of CERCLA, cost recovery cases must be filed within three to six years, depending on the type of response. If a suit is filed after the specified time, the Agency's case could be dismissed.

There are seven key dates that limit the Agency's ability to pursue an initial cost recovery action for post-SARA response. These are:

- Conventional removal action: **3 years** from the completion date [section 113(g)(2)(A) of CERCLA]
- Conventional removal action with CERCLA section 104(c)(1)(C) waivers: **6 years** from the date the Regional Administrator signs the waiver
- RI/FS: **3 years** from signing date of the ROD
- RD: **3 years** from completion of the design
- Conventional removal actions, RI/FSs, and RDs, followed by the start of a remedial action within **3 years** of the completion date of removal, RI/FS, or RD activity: **6 years** from the starting date of physical on-site remedial activity
- Remedial action: **6 years** from the starting date of physical on-site construction of the remedy [section 113(g)(2)(B) of CERCLA]
- Subsequent cost recovery actions where there is a declaratory judgment on liability for response costs: **3 years** after the completion date of all response activity [section 113(g) of CERCLA].

RPMs/OSCs also must be aware that special circumstances, such as bankruptcy, impending fradulent transfer of assets, or the voluntary dissolution of the business of a PRP may require that a cost recovery case be filed on an expedited basis in order to assure that assets of the PRPs are available to pay for the cleanup.

Reference

OSWER Directive 9832.3-1A, "Cost Recovery Actions/Statute of Limitations" (June 1987).

Decision Not To Pursue Cost Recovery

The Region may decide not to pursue cost recovery at a particular site after analyzing the site's cost recovery potential. Such decisions must be documented in a close-out memorandum and entered into CERCLIS. A decision not to pursue further cost recovery can also be addressed in the 10-point settlement analysis. Both of these documents provide the Agency with a means of tracking the sites that have no further potential for cost recovery and removing them from projections of future Fund revenues.

Information gathered during the PRP search, removal action, and the RI/FS forms the basis of the decision not to pursue cost recovery. The possible reasons for a Region to decide not to pursue cost recovery include:

- No PRPs were identified for the site
- PRPs identified were not financially viable
- Available evidence does not support one or more of the essential elements of a prospective case, and there is no reason to believe that such evidence can be discovered in the future
- Very small expenditures on the site and inadequate resources to litigate.

Close-out Memorandum

The close-out memorandum will be written by the enforcement or removal program staff person assigned to the case. The close-out memorandum must be signed by the Regional program division director. Where legal issues are involved, the memorandum should be written in consultation with an ORC attorney. The memorandum and its supporting documents are considered confidential; therefore, the close-out memorandum should not be placed in the Administrative Record. Chapter XV, Records Management, discusses how to handle confidential files.

References

OSWER Directive 9832.12, "Guidance on Cost Recovery Strategy" (July 1988).

OSWER Directive 9832.11 "Guidance on Documenting Decisions Not to Take Cost Recovery Actions (June 1988).

D. Notification and Demand Requirements

Under CERCLA and current Agency policy, there are several different provisions for notifying PRPs of their potential liability for clean-up costs. For cost recovery purposes, the most important requirements are the issuance of letters with demands for reimbursement, either notice letters or demand letters.

Special Notice Letters

Special Notice Letters (SNLs) are issued prior to non-time-critical removals, RI/FSs and RD/RAs pursuant to section 122(e)(1) of CERCLA when it is determined that a period of formal negotiations would facilitate an agreement with the PRPs. While a primary purpose of these letters is to facilitate negotiations for prospective work, the letters also serve as a vehicle to put past costs into the negotiations and trigger pre-judgment interest. Planning for non-time-critical removals, RI/FS, and RD/RA should include documentation of past costs. Special notice letters should include a demand for past as well as prospective costs.

Reference

OSWER Directive 9843.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 1987).

Demand Letters

Prior to filing a cost recovery lawsuit, as a matter of policy, EPA sends a written demand letter to the PRPs. A demand letter is a request that the PRPs reimburse the Fund for a specified amount, which is generally associated with one or more response activities. Also, written demand triggers the accrual of pre-judgment interest on the response costs sought. The authority to issue demand letters has been delegated to the Regional Administrators. RPMs should consult with their Regional management to determine who has redelegated responsibility for preparing and issuing demand letters in the Region.

Demand letters should be sent for each separate response activity, such as removals, RI/FSs, RDs, and RAs. The optimum time for issuing demand letters varies, depending on the nature of the response.

- For removal actions, the OSC should issue the letter soon after the removal activities are completed and all necessary documents are compiled.
- For each operable unit of remedial actions, a letter should be issued for the RI/FS costs, RD costs and major phases of RA costs at the following times:
    - In connection with the ROD (in special notice)
    - Soon after the RD is completed
    - Soon after major phases of the RA are completed.

Types of Costs and Pre-Judgment Interest

In accordance with section 107 of CERCLA, the demand letter should seek to recover interest from the date that a payment of a specified amount is demanded in writing, or the date that an expenditure is actually incurred, whichever is later. The demand letter should include a request for all costs, including:

- Contractor costs
- EPA direct costs, including costs such as EPA staff salaries, travel and other miscellaneous site-specific expenses

- Costs incurred under Interagency Agreements, including Corps of Engineers, DOJ, ATSDR, and Coast Guard
- Costs incurred under Cooperative Agreements, including State agreements
- Indirect costs incurred by EPA for the response actions
- Pre-judgment interest
- Future costs.

References

Comptroller Policy Announcement 87-17, "Interest Rates for Debts Recoverable Under the Superfund Amendments and Reauthorization Act of 1986" (September 1987).

OARM, Superfund Indirect Cost Manual (March 1986).

E *Documentation Requirements*

The Region's site files will contain several types of documents that can be used to support a cost recovery action, including:

- Enforcement information, including data on PRP liability
- The administrative record, relating to the selection of the response action
- Activity and cost documentation.

This section discusses the documents relating to the third category.

When the Region begins its cost recovery action, a Regional member of the case development team may be designated as the Cost Recovery Coordinator in Regions that do not already have designated Cost Recovery Coordinators. The person preparing the referral has primary responsibility for collecting and organizing cost recovery documentation.

References

OSWER Directive 9832, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)" (August 1983).

OSWER Directive 9832.0-1A, "Procedures for Documenting Costs in CERCLA Section 107 Actions" (January 1985).

FMD, "State Superfund Financial Management and Recordkeeping Guidance" (August 1987).

OARM, "Superfund Financial Management and Recordkeeping Guidance for Federal Agencies" (January 1989).

Types of Expenditures

The government's costs of the response action can be broadly divided between direct and indirect expenditures. Direct expenditures are those that are attributable solely to the site in question. These include contractor, EPA, and other Federal and State agency staff time, travel and equipment directly associated with the site. Indirect costs, on the other hand, are costs incurred which support more than one response action (e.g., office space, light, and supplies for contract and EPA personnel who work on the response actions), and so must be apportioned among all the response actions that they support. Under general accounting principles, total cost is the sum of "direct" and "indirect" costs. Both types of costs are recoverable under CERCLA.

The types of expenditures for response activities that are recoverable include:

- EPA site-specific payroll costs
- EPA site-specific travel expenditures
- Interagency Agreement expenditures
- Cooperative Agreement expenditures
- Costs incurred under EPA contracts with private contractors
- Other site specific expenditures.

EPA Indirect Costs

The indirect costs of EPA are included in the response action cost summaries as a separate item of cost. EPA indirect costs for a site represent the portion of the EPA's overhead and general and administrative costs which supported the response action at the site in question. The Agency uses a formula for recovering costs which has been developed by a major national accounting firm, and an indirect rate is calculated for each fiscal year. Indirect rates are calculated by determining the total direct hours charged to the site during each fiscal year by Regional program staff and multiplying this number by the indirect rate for the fiscal year.

Reference

Office of the Comptroller, OARM, Superfund Indirect Cost Manual for Cost Recovery Purposes (1986).

Evidence

The costs of response activities recoverable under section 107 of CERCLA are reflected in a variety of financial records and documents. There are two general types of information that will be available to prove the Agency's costs:

- Activity evidence; documents proving that the response activities were actually undertaken (i.e., authorized and completed)
- Cost evidence; documents proving that costs were actually incurred and paid for by the government.

RPMs/OSCs often will provide from their files:

- Authorization for the scope and performance of work by the agency or the contractor at the site, including documents such as Action Memoranda, Work Plans, Work Assignments, Technical Directive Document (TDD)
- Authorization for change in the scope or cost of work done at the site, including documents such as Work Plan revisions and contract modifications
- Evidence of contractor performance of work at the site and documentation of completion of that work, including documents such as the Form 1955s for a removal, monthly technical and financial status reports for REM contracts, TDD or work assignment completion forms.

In managing this information from the Agency's site files, RPMs should assure that Financial Management offices have provided the following types of documents:

- Timesheets/timecards and payroll expenses
- Travel vouchers and receipts
- Treasury schedules
- Contracts/Letters of Agreement
- Purchase orders and receipts
- Paid processed invoices and vouchers.

Properly documented costs generally lead to admissible evidence. This type of documentation lays the foundation for successful settlement negotiations and litigation. Therefore, RPMs/OSCs should work in close cooperation with Regional counsel to produce admissible evidence documenting the Agency's costs.

Cost Summaries

To prevent the courts from being burdened with unwieldy documentation, Rule 1006 of the Federal Rules of Evidence allows voluminous documentation to be condensed into summaries. These summaries must accurately characterize the underlying documents. In order to introduce a summary in court under Rule 1006, EPA must provide all of the underlying documents to the other parties at a reasonable time and may further be required to produce the documents in court. Confidential Business Information (CBI) and Privacy Act Information must be redacted (edited to delete confidential information).

The RPM and OSC should play an important role in the process of cost recovery not only by assuring that documentation of the activities is provided, but also by assuring that the cost summaries are complete and accurate. It is essential that the cost summary provide a complete, accurate and easily understandable summary of the work performed for each cost claimed. In addition, when multiple activities (such as an RI/FS, a removal and a remedial action) have been carried out by the same contractor or State or Federal agency, the RPM/OSC is the best EPA employee to assure that the summaries accurately reflect these activities. The summaries must also include the dates of actual service as provided by the contractor. The RPM/OSC should assure that the dates are accurate since they are used to calculate statute of limitations and authorization issues under contracts. The RPM and OSC should always check the cost package to assure that all costs have been included. Much of the information in the cost package comes from the Integrated Financial Management System (IFMS) and there are a number of costs which are not reflected in that system. The RPM should be careful to see that costs of other Agencies, such as ATSDR, DOJ, FEMA, Coast Guard, and Health and Human Services are included. In addition, the summary must be checked to see that all costs that have been satisfied or paid are reflected in the cost summary, including bankruptcy proceeds, settlements with other parties, costs disallowed after audit resolution or paid by the State or a private party. The RPM also will need to assure that calculations of the 10 percent share which the State owes for reimbursable expenses is included and accurately reflected in the summary.

In cost recovery actions, the summaries must include a description of the response activities, expenditure types, and actual costs, and must indicate which agency performed the activity. Cost summaries, which are primarily the responsibility of the Regional financial office, should be arranged according to the following format:

- Agency site-specific payroll costs
- Agency site-specific travel expenditures
- Interagency Agreement expenditures
- Cooperative Agreement expenditures
- Site-specific contracts with contractors
- Non-site-specific contracts with contractors
- Other Federal costs.

The above information should be summarized in a brief.

Because the cost summary is developed early in the case development process, the cost summaries will need to be updated regularly as the various response action phases are initiated and completed. RPMs/OSCs should obtain updated cost summaries at the most critical stages of the response and litigation processes, and periodically (e.g., annually) during periods of substantial expenditure. Frequent updating ensures that the most recent cost data is available for management review.

The cost summaries should be reviewed for completeness, including:

- Cost summaries do not demand payment for amounts which have been previously recovered (e.g., bankruptcy proceeds, settlements)

- Cost summaries include costs incurred by agencies with transfer allocations, whose costs are not included in the IFMS (DOJ, FEMA, ATSDR, USACE)

- State matching funds must be reflected in the summary so that we know what costs must be matched and so that we do not demand in excess of the 90% of such costs which the U.S. is entitled to claim.

Exhibit XII-2 outlines the type of material that should be included in a cost summary report.

F. *Documentation Procedures*

This section describes the procedures that are followed by Regional and Headquarters EPA staff and DOJ in assembling the cost and activity documentation for a cost recovery case. The process is initiated in the Regions, where the RPM/OSC or Cost Recovery Coordinator presently completes a Cost Recovery Checklist and sends that checklist to OWPE. This function will likely be delegated to the Regions in FY 90. A copy of a Cost Recovery Checklist is contained in OWPE, "Procedures for Documenting Costs for CERCLA Section 107 Actions," Appendix D (January 1985).

Regional Cost Documentation Procedures

The Cost Recovery Coordinator, a Regional member of the case development team, should work with the Regional Financial Management Office to coordinate Regional cost documentation efforts. Either the Regional Finance Office or a designated program staff person is responsible for collecting, assembling, and summarizing Regional cost documents.

The Regions have the responsibility of collecting underlying cost documentation and compiling cost summaries. The Regions should request non-Regional and Headquarters cost documentation from OWPE. Regions should allow at least two to three months for delivery of non-Regional and Headquarters cost documents from the date the request is received in Headquarters. An additional month may be needed for review and reconciliation.

The Regional servicing finance office should maintain copies of the financial documents for each site listed on the NPL. The Cost Recovery Coordinator is responsible for maintaining and updating the cost documentation files. These site files should be reconciled with the IFMS on a semi-annual basis.

The Regions are responsible for preparing the following categories of cost documents:

- Agency site-specific Regional payroll costs
- Agency site-specific Regional travel expenses
- Other site-specific Regional charges
- Site-specific Cooperative Agreements
- Non-site-specific Cooperative Agreements
- Site-specific indirect costs.

374

Exhibit XII-2(1)

Cost Summary Format

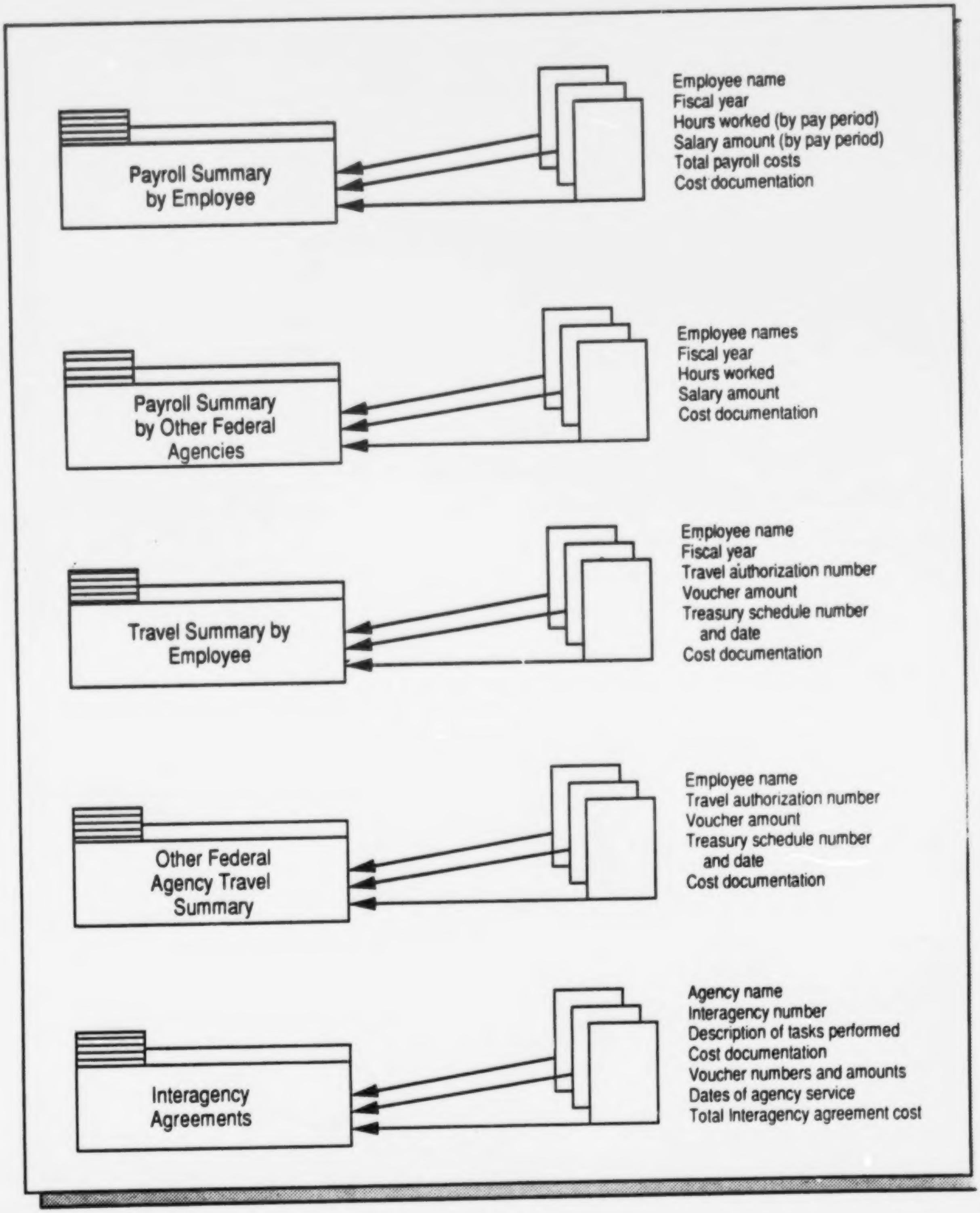
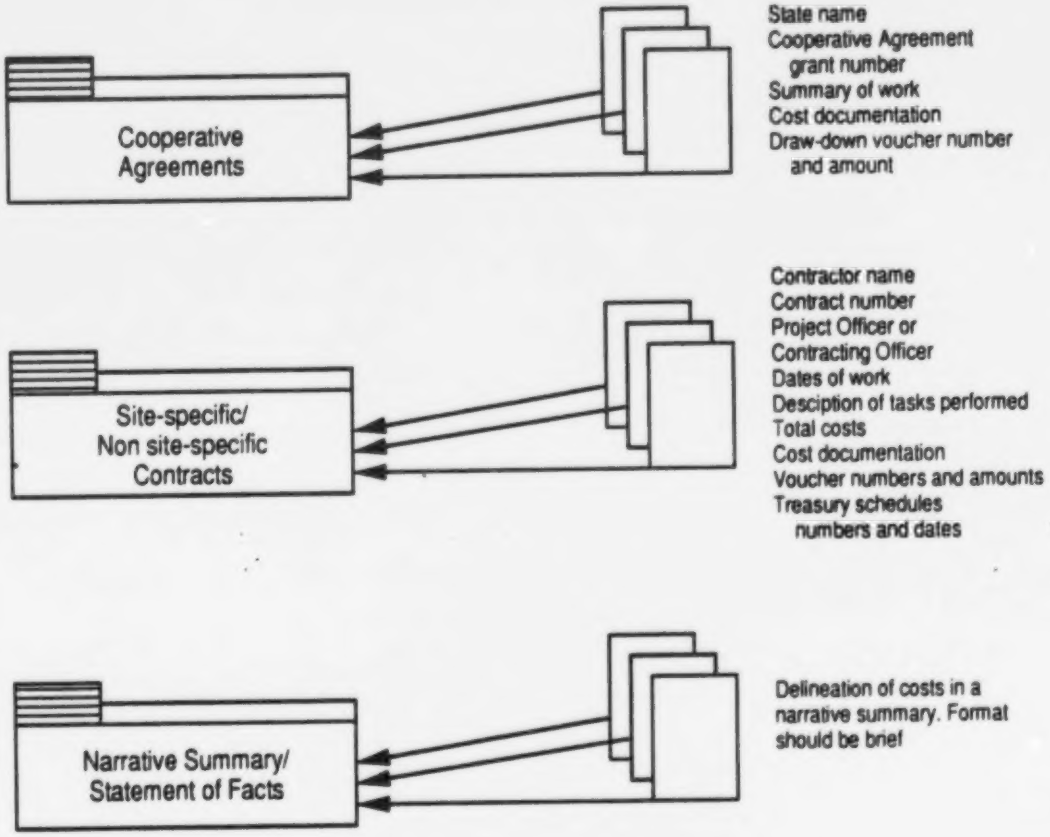

Payroll Summary by Employee
Employee name
Fiscal year
Hours worked (by pay period)
Salary amount (by pay period)
Total payroll costs
Cost documentation
Payroll Summary by Other Federal Agencies
Employee names
Fiscal year
Hours worked
Salary amount
Cost documentation
Travel Summary by Employee
Employee name
Fiscal year
Travel authorization number
Voucher amount
Treasury schedule number and date
Cost documentation
Other Federal Agency Travel Summary
Employee name
Travel authorization number
Voucher amount
Treasury schedule number and date
Cost documentation
Interagency Agreements
Agency name
Interagency number
Description of tasks performed
Cost documentation
Voucher numbers and amounts
Dates of agency service
Total Interagency agreement cost

Exhibit XII-2(2)

Cost Summary Format


Cooperative Agreements
Site-specific/ Non site-specific Contracts
Narrative Summary/ Statement of Facts

State name
Cooperative Agreement
  grant number
Summary of work
Cost documentation
Draw-down voucher number
  and amount

Contractor name
Contract number
Project Officer or
Contracting Officer
Dates of work
Desciption of tasks performed
Total costs
Cost documentation
Voucher numbers and amounts
Treasury schedules
  numbers and dates

Delineation of costs in a narrative summary. Format should be brief

After the Cost Recovery Coordinator receives the compiled cost documents from the State and OWPE, he/she is responsible for assembling the cost package with the case team. Once the case team has reviewed the cost package, a cost summary is prepared and this summary report is added to the DOJ referral package. The actual cost documents are retained in the Regional site file. In some Regions, the cost documentation file derives documents from site files and is maintained separately.

Exhibit XII-3 presents a flow chart of activities involved in the cost documentation process.

OWPE Cost Documentation Procedures

OWPE requests case cost documentation, tracks receipt of documents, assembles, and summarizes cost documents. OWPE is responsible for the documentation of the following types of costs:

- Site-specific Field Investigation Team (FIT) costs
- Site-specific Technical Assistance Team (TAT) costs
- Site-specific Technical Enforcement Services (TES) contract costs
- Site-specific Emergency Response Contract (ERC) costs
- Site-specific Contract Laboratory Program (CLP) costs
- Site-specific Remedial Contract (REM) costs
- Site-specific Environmental Service Assistance Team (ESAT) costs
- Site-specific Alternative Remedial Contract Strategy (ARCS) costs
- Site-specific Environmental Emergency Response Unit (EERU) costs
- Site-specific National Enforcement Investigations Center (NEIC) costs
- Interagency Agreement (IAG) costs
- Site-specific Headquarters payroll costs
- Site-specific Headquarters travel expenditures
- Miscellaneous costs related to the Agency's response activity
- Costs of overflights and aerial photography by the Environmental Photographic and Investigation Center (EPIC) and analyses of the photographs provided by the Environmental Monitoring and Systems Laboratory (EMSL).

For some costs prior to 1985, contracts were not site-specific and costs must be assigned to appropriate projects.

After receiving the completed cost recovery checklist from the Regions, OWPE requests that FMD provide cost documentation for site-specific charges included in the IFMS. RPMs should also note that OWPE requests the underlying cost documents (e.g., timesheets, travel expense reports, paid invoices) from FMD.

OWPE also requests cost documentation from the Contract Laboratory Program (CLP) contractor. This information is included in the site-specific reports generated by the Software Package for Unique Reports (SPUR) as of October 1985. RPMs may use the CLP reports for documenting costs at a particular site.

OWPE prepares a standard summary for each of the cost categories, which follows the format shown below:

- Site-specific Headquarters payroll
- Site-specific Headquarters travel expenditures
- Interagency Agreement billings
- Site-specific contracts
- Other site-specific Superfund contracts which are not invoiced site-specifically.

OWPE sends the cost documents and a copy of the summary to the Regional Cost Recovery Coordinator.

FMD Cost Documentation Procedures

FMD is responsible for tracking most of the obligations and disbursements of Superfund monies. FMD uses the computerized Integrated Financial Management System (IFMS) to track EPA payroll, travel, site-specific contracts, interagency transfer of funds, and draw-downs approved under Cooperative Agreements. RPMs should cooperate with FMD to produce well-documented cost data.

DOJ Cost Documentation

The DOJ representative on the case development team is responsible for collecting and summarizing DOJ litigation costs. DOJ is ultimately responsible for litigating cost recovery cases. Therefore, the DOJ representative should assist the Regions in accumulating and organizing cost recovery documents.

G. *Judicial Cost Recovery*

When EPA and the PRPs do not reach a negotiated settlement for reimbursement of EPA's response costs, EPA usually sues the PRPs to recover those costs. This action, taken under section 107 of CERCLA, is known as a judicial cost recovery action. A judicial cost recovery action requires the involvement of the RPM, ORC staff, and attorneys from DOJ. The action is initiated when EPA prepares a referral package for DOJ. The referral package presents the evidence in the case and explains what EPA is seeking to recover.

Referral Package

To assist DOJ in preparing for cost recovery litigation, RPMs should work with the Regional attorney to prepare a section 107 referral package. At a minimum, the package should include the following information:

378

- Description of the response actions and their status
- Administrative Record Index and Action Memorandum/Record of Decision
- PRP liability analysis
- Natural resource damage claims (summarizes communications with trustee)
- Activity and cost documentation
- Anticipated defenses.

Generally, the following remain in Regional files:

- Administrative Record
- PRP search backup documents (e.g., 104(e) responses)
- Activity and cost documentation.

The cost documentation package must be complete before the case is referred to DOJ, except where there are statute of limitations problems. All documents in the package should be indexed. Proper indexing enables the case management team to access pertinent evidence from voluminous cost recovery case files.

Litigation Support

RPMs and OSCs, with ORC and Civil Investigator assistance, play an important role in supporting cost recovery litigation, including:

- Ensuring that the PRP search provides sound evidence of liability and, for generators, waste-in information
- Ensuring that the Administrative Record regarding the selection of remedy is compiled
- Ensuring that all activities and costs are documented as needed
- Providing the technical lead for the case and acting as witnesses as necessary to prove the technical performance of the work at the site for which costs were incurred
- Assisting in case preparation and at trial in establishing discrete activities and associated costs that were related to each phase of the work at the site (e.g., RI/FS, various removals, work on separate operable units)
- Identifying potential fact witnesses who have personal knowledge of potentially relevant information, such as the PRP's liability, by providing the following information:

  - Present place of employment
  - Home and business phone numbers
  - Substance of testimony (brief statement)
  - Whether the witness' statement is on file.

- Identifying and interviewing potential expert witnesses, if necessary (e.g., hydrogeologists and soil scientists)
- Identifying expert witnesses to participate in negotiations, if necessary
- Identifying potential adverse witnesses (either fact or expert) and indicate the substance of expected testimony, if known.

In addition, RPMs and OSCs may be asked to assist Regional attorneys in preparing affidavits to substantiate the Agency's response costs, or in preparing pre-trial motions, such as motions for summary judgment and motions to dismiss.

Litigation Management Plan

A litigation management plan should be developed and approved by team members. A list of the contents of the litigation management plan is included as an appendix to this chapter. This plan is discussed in more detail in Chapter III, Comprehensive Site Planning.

As a practical matter, most cases do not go to trial. There is strong legal precedent to support the Agency's right to make claims for reimbursement of all incurred costs plus interest. Consequently, most cost recovery cases will be settled out of court. The primary function of both the RPM and OSC in litigation support is to work closely with the attorneys from ORC and DOJ.

H. *De Minimis Settlements*

In addition to settlements during RD/RA negotiations, de minimis settlements are tools that may be used for eliminating the smaller contributors from the cost recovery process. Section 122(g) of CERCLA provides for settlement ". . . whenever practicable and in the public interest..." if such a settlement ". . . involves only a minor portion of the response costs." There are two situations in which the Agency may agree to a de minimis settlement:

- The amount and toxicity of the hazardous substance contributed by the PRP are minimal compared to other hazardous substances at the facility
- The PRP is an owner that did not contribute to the release or threat of release through any action or omission, did not conduct or permit the management of hazardous substances on the property, or purchase the property with knowledge of its use for generation, transportation, treatment, storage, or disposal.

Necessary Information

The PRP search process is critical to determining whether a PRP is a de minimis contributor. The search will provide the RPM with information regarding the identity, waste contributions, and financial viability of the PRPs. The Regional management will determine whether a PRP is a de minimis contributor through an analysis that includes each PRP's waste contribution, whether the settlement is "practicable and in the public interest," and whether all past costs are known. If the Agency expects to incur future costs, this will affect the scope of the settlement and covenant not to sue.

De minimis settlements may be entered as either:

- Administrative orders on consent
- Judicial consent decrees.

The Regions may issue administrative orders on consent when the total response costs at the site are under $500,000. However, under section 122(g)(4) of CERCLA and the EPA delegations, when the total costs exceed $500,000 (excluding interest), the Regional Administrator must:

- Obtain the approval of the Assistant Attorney General (AAG) for the Land and Natural Resources Division of DOJ, and
- Consult with and obtain concurrence from the Assistant Administrators of OSWER and OECM.

All de minimis settlements must comply with the public comment procedures stipulated in section 122(i) of CERCLA.

Release From Liability and Reopeners

The Agency may grant de minimis settlors a covenant not to sue. EPA's covenant not to sue is given in exchange for the PRP's agreement to pay for part of the response costs. This agreement may release the PRPs from future liability for costs incurred by the Agency. The scope of the covenant will vary depending on site-specific factors. Under CERCLA, these covenants may be conditional. The Agency may agree to such a release only if the terms of the covenant include reopeners. Reopeners protect the Agency against cost overruns and the risk of paying for any further response action at the site. In appropriate cases, this may be covered by premium payments.

Reference

OSWER Directive 9834.7, "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA" (June 1987).

Administrative Settlements

Section 122(h)(1) of CERCLA expressly authorizes the Agency to settle its cost recovery claims under section 107 if the case has not been referred to DOJ. However, when the total response costs at a facility exceed $500,000 (excluding interest), the Regional Administrator must obtain the written approval of DOJ. He/She must also consult with AA, OSWER and AA, OECM.

References

"Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E" (June 17, 1988).

OECM, "Draft Procedures for Administrative Settlements Under Sections 122(h)(1) and (4) of CERCLA" (October 1987).

J. Enforcing Settlements

If a settling PRP fails to comply with the terms of the settlement, the matter should be referred to DOJ for civil action. Case referrals should occur within six months of the default date. In addition to inherent governmental authority, section 122(h)(3) of CERCLA authorizes DOJ to bring a civil action to enforce the terms of the agreement. These terms are not subject to judicial review. DOJ may petition the court to impose the civil penalties authorized by section 109 of CERCLA.

K. Arbitration

Arbitration allows parties to resolve their disputes without litigating the matter in court. Section 122(h)(2) of CERCLA authorizes the use of arbitration to resolve cost recovery claims against PRPs if the total response costs at a facility do not exceed $500,000 (excluding interest). Parties to a cost recovery action must consent to submitting the claim to arbitration.

In binding arbitration, the parties are bound to follow the decision of the arbitrator, unless the arbitrator acts improperly. Binding arbitration offers the Agency an expedited means of resolving small cost recovery cases without the large expenditures of enforcement resources required for traditional litigation. Arbitration is most appropriate in the following situations:

- The case is routine and does not present issues of national importance
- A large percentage of the PRPs at the facility agree to participate.

Section 122(i) of CERCLA requires the proposed decision to be published in the Federal Register (FR) for a thirty-day comment period.

On May 30, 1989, EPA published the final rule for implementing the arbitration procedures in 54 FR 23174. Exhibit XII-4 shows a flowchart of the procedures.

L. Mixed Funding

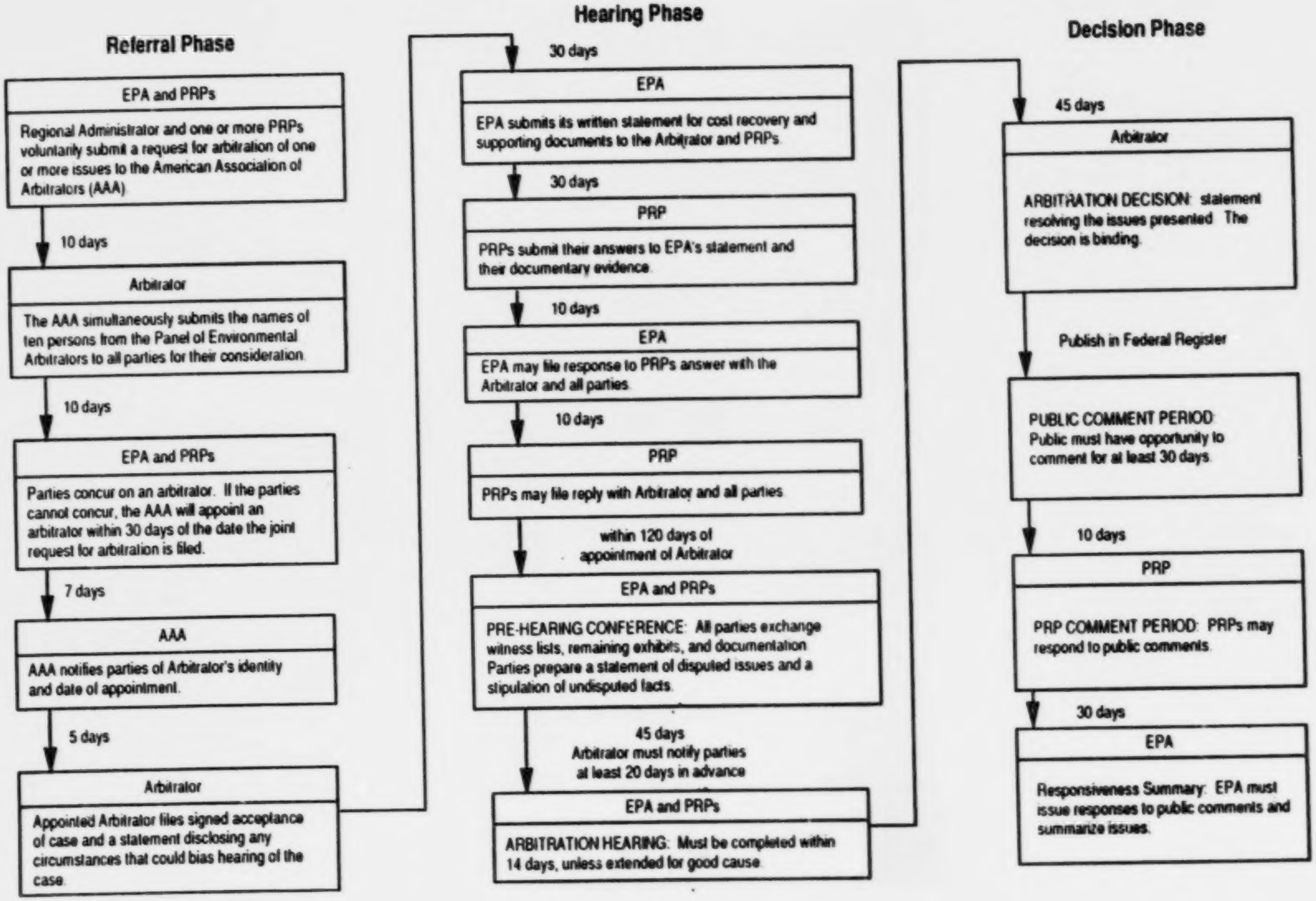
Section 122(b) of CERCLA authorizes the Agency to enter into mixed funding agreements. Under the terms of a mixed funding agreement, the Agency shares the response costs with settling PRPs. RPMs should note that when the Agency enters into a mixed funding agreement involving either a preauthorization or a cash-out with certain PRPs at a site, EPA must make a reasonable effort to recover the amount of such reimbursement from non-settling PRPs under a separate cost recovery action. A more complete discussion of mixed funding can be found in Chapter VIII, RD/RA Negotiations.

M. Bankruptcy Actions

Some PRPs may file for bankruptcy before reimbursing the government for its response costs. While the Regional attorney will handle most issues related to the PRP's petition for bankruptcy, the RPM should have a working understanding of the process. The following discussion should help RPMs become familiar with pertinent concepts of bankruptcy law.

Exhibit XII-4

Arbitration Procedures for Small CERCLA Cases



Referral Phase

EPA and PRPs

Regional Administrator and one or more PRPs voluntarily submit a request for arbitration of one or more issues to the American Association of Arbitrators (AAA).

10 days

Arbitrator

The AAA simultaneously submits the names of ten persons from the Panel of Environmental Arbitrators to all parties for their consideration.

10 days

EPA and PRPs

Parties concur on an arbitrator. If the parties cannot concur, the AAA will appoint an arbitrator within 30 days of the date the joint request for arbitration is filed.

7 days

AAA

AAA notifies parties of Arbitrator's identity and date of appointment.

5 days

Arbitrator

Appointed Arbitrator files signed acceptance of case and a statement disclosing any circumstances that could bias hearing of the case.

Hearing Phase

30 days

EPA

EPA submits its written statement for cost recovery and supporting documents to the Arbitrator and PRPs.

30 days

PRP

PRPs submit their answers to EPA's statement and their documentary evidence.

10 days

EPA

EPA may file response to PRPs answer with the Arbitrator and all parties.

10 days

PRP

PRPs may file reply with Arbitrator and all parties.

within 120 days of appointment of Arbitrator

EPA and PRPs

PRE-HEARING CONFERENCE: All parties exchange witness lists, remaining exhibits, and documentation. Parties prepare a statement of disputed issues and a stipulation of undisputed facts.

45 days
Arbitrator must notify parties at least 20 days in advance

EPA and PRPs

ARBITRATION HEARING: Must be completed within 14 days, unless extended for good cause.

Decision Phase

45 days

Arbitrator

ARBITRATION DECISION: statement resolving the issues presented. The decision is binding.

Publish in Federal Register

PUBLIC COMMENT PERIOD: Public must have opportunity to comment for at least 30 days.

10 days

PRP

PRP COMMENT PERIOD: PRPs may respond to public comments.

30 days

EPA

Responsiveness Summary: EPA must issue responses to public comments and summarize issues.

Statutory Background

A PRP may file a petition for bankruptcy under either Chapter 7 (liquidation) or Chapters 11 and 13 (reorganization) of the Bankruptcy Code. Bankruptcy proceedings under Chapter 7 involve the collection and distribution of all the debtor's non-exempt property.

By contrast, Chapters 11 and 13 allow the debtor to reorganize and rehabilitate rather than liquidate. Under Chapters 11 and 13, the creditors look to the future earnings of the debtor to satisfy their claims.

There are two bankruptcy issues that the RPM should understand: proof of claim and priorities in bankruptcy.

Proof of Claim

Under the Bankruptcy Code, a debtor is discharged from his/her debts. This statutory provision releases a debtor from debts incurred before the debtor filed his/her petition for bankruptcy (previous debts). Creditors may object to the discharge of their claim against the debtor. The creditors must establish proof that they had a valid claim against the debtor's estate that has not been discharged as a previous debt. Creditors establish this claim by filing a proof of claim in the bankruptcy court. The deadlines for filing a proof of claim are as follows:

- Under Chapter 7 of the Bankruptcy Code: 90 days from the first meeting of creditors
- Under Chapters 11 and 13 of the Bankruptcy Code: the bar notice fixes the deadline.

The Agency has established a systematic procedure for receiving and distributing bankruptcy information. This procedure ensures that the Agency files its proof of claim within the statutorily defined deadlines, if appropriate. EPA has designated OECM's National Project Branch (NPB) as a central contact in Headquarters to receive all preliminary bankruptcy information. The NPB, in cooperation with the Regional bankruptcy contacts, will determine whether a particular multi-region bankruptcy matter should be handled as Headquarters-lead or as a Regional-lead.

The Bankruptcy Code requires a person to provide notice to all creditors. ORC takes the lead role in responding to the PRP's notice. Regional attorneys engage in the following activities:

- Notifying the NPB at (FTS) 475-8293 and describing the status of the bankruptcy petition
  - identifying whether the bankruptcy petition was filed under Chapter 7, 11, or 13 of the Bankruptcy Code
  - determining whether a reorganization plan has been filed by the PRP
  - identifying the bar date for the proof of claim.
- Sending all initial notices regarding any bankruptcy proceedings to the OECM

attorney at Headquarters

- Providing assistance to ORC and DOJ in the Agency's efforts to establish its proof of claim
- Providing assistance in preparing referrals to DOJ for filing proofs of claim and other necessary documents.

If the PRP has actually filed a petition for bankruptcy, DOJ and ORC will have the responsibility of obtaining the necessary bankruptcy documents to establish the Agency's proof of claim. In most cases, the RPM will have a limited role in the bankruptcy proceedings.

Environmental Claims as Priorities

As a practical rule, a bankrupt party's estate does not have sufficient assets to satisfy all of the creditors' claims. However, if the Agency's claim is treated as a priority, the claim must be fully satisfied before the other creditors receive any money.

EPA's cost recovery actions can be treated as a priority if the Agency can establish that the costs were administrative costs, or that a Federal lien has been filed against the PRP's property. For example, administrative costs are incurred when EPA incurs costs for responding to the release on the debtor's property after the bankruptcy petition has been filed. A Federal lien for cleanup costs is created under section 107(l) of CERCLA. The lien continues to be enforced against the property until the liability is either fully satisfied, or the claim becomes unenforceable by operation of the statute of limitations.

References

OECM, "Guidance on Federal Superfund Liens" (September 1987).

OECM, "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties" (May 1987).

OECM, "Revised Hazardous Waste Bankruptcy Guidance" (May 1986).

"Coordination Guidance of Agency Involvement in Bankruptcy Proceedings in RCRA and CERCLA Enforcement" (May 1988).

II. PLANNING AND REPORTING REQUIREMENTS

A. Planning Since cost recovery actions are integrated into the Superfund process, planning for cost recovery actions, such as demand letters, negotiations, etc., should be included in the site management plan. These planned activities should be entered into CERCLIS so that they will be properly credited in SCAP and SPMS. Once sites have been selected and prioritized, these sites should be targeted in the Regional SCAP/SPMS commitments. RPMs/OSCs should note that bankruptcy referrals and sites with expenditures under $200,000 do not count against SCAP or SPMS targets for section 107 referrals. Extramural expenditures are used in planning. Moreover, targeted section 107 referrals that settle administratively before referral are not credited as referrals. In addition there are SCAP targets for sites with costs less than $200,000. Referrals should be tracked through the docket to case resolution. When planning identifies a site where cost recovery will not be pursued, the preparation of a decision not to pursue document should be planned. The RPM should work with DOJ to track the progress of the case through the court's docket.

B. Budgeting Funding for cost recovery activity is obtained from the enforcement budget. Standard budgets for cost recovery cases will vary depending upon the type of cost recovery.

C. Reporting Requirements CERCLIS is the nationally designated data base for managing information about Superfund activities. Tracking Superfund cost recovery activities must be conducted in a nationally consistent manner. Consistency facilitates budget planning, program evaluation, and requests for information from Congress or other parties. RPMs/OSCs should confirm that the outcomes of all post-SARA settlements, judgments, and unilateral orders have been entered into CERCLIS.

RPMs/OSCs should ensure that target dates for demand letters, negotiations, referrals, decisions not to pursue cost recovery, and other enforcement activities are recorded in CERCLIS. Pre-SARA settlements should be reviewed to determine if CERCLIS should be updated with information pertaining to the reimbursement of oversight costs. If the Regions enter the data in a timely manner, CERCLIS is capable of producing several classes of enforcement activity reports as shown in Exhibit XII-5.

RPMs/OSCs are responsible for working with the cost recovery coordinator and IMC to complete an accurate CERCLIS site information form (SIF) for cost recovery activity. Exhibit XII-6 provides an example of a completed SIF for section 107 or 106/107 litigation. The RPMs should complete the SIF using the sample outline of fields and values:

A. Litigation Type Code/Name (SV = Section 107 or CL = Section 106/107 or CB = Claim in Bankruptcy)
B. Lead (FE = Federal Enforcement)
C. Plan start/complete date (FYQ, start -- planned referral date; complete - planned date for case resolution)
D. Actual start/complete date (MM/DD/YY, start -- date the package is referred/signed by the RA; complete -- date the case is resolved)
E. SPMS Target Status (P = Primary, A = Alternate)
F. SCAP Note (Comments on litigation)
G. Judicial/Civil Type (N = New, A = Amend)

H. Number of Defendants named in the referral package (7)
I. Enforcement Activity Outcome Code/Name (CD = Consent Decree)
J. Statutes (Section 107 of CERCLA, include all statutes which are cited in the complaint)
K. Remedy Operable Unit (Operable Unit addressed by cost recovery, there can be multiple)
L. Remedy Type/Name and Sequence Number (VO1 = Cost Recovery for RI/FS, there are other types of remedies)
M. Remedy Qualifier
N. Milestone Code/Name (RJ = Received at to DOJ, FI = Case Filed, to be entered by HQ)
O. Milestone Actual Completion Date (MM/DD/YY)
P. Financial Requirements:
    1. Financial Type/Name (F = Federal Cost Recovery, see below for G = Planned)
    2. Financial Amount (Amount sought in cost recovery action)
Q. OECM Case Name
R. OECM Case Number
S. DOJ Case Name
T. DOJ Case Number

The start date for a section 107 or section 106/107 referral is the date the Regional Administrator signs the Referral Transmittal Letter sending the referral to DOJ or HQ.

The definition of a section 106 or 106/107 case resolution is the conclusion of a section 106 judicial action that fully addresses all claims in the complaint. Case resolution is credited when:

- A settlement is entered in the court fully addressing the complaint with all parties
- The case is withdrawn or dismissed, or
- A trial has concluded and judgment entered fully addressing the complaint.

The definition of a section 107 case resolution is the conclusion of a section 107 cost recovery judicial action that fully addresses all claims in the complaint. Credit is given when:

- A settlement is entered in the court fully addressing the complaint with all parties
- The case is withdrawn or dismissed, or
- A trial has concluded and a judgment reached.

The measure of "Cost Recovery Dollars Achieved" includes:

- Litigation (upon entry of a judgment)
- Settlement (upon referral of a CD by the Region to HQ or DOJ)

Exhibit XII-5

Enforcement Activity Report Structure

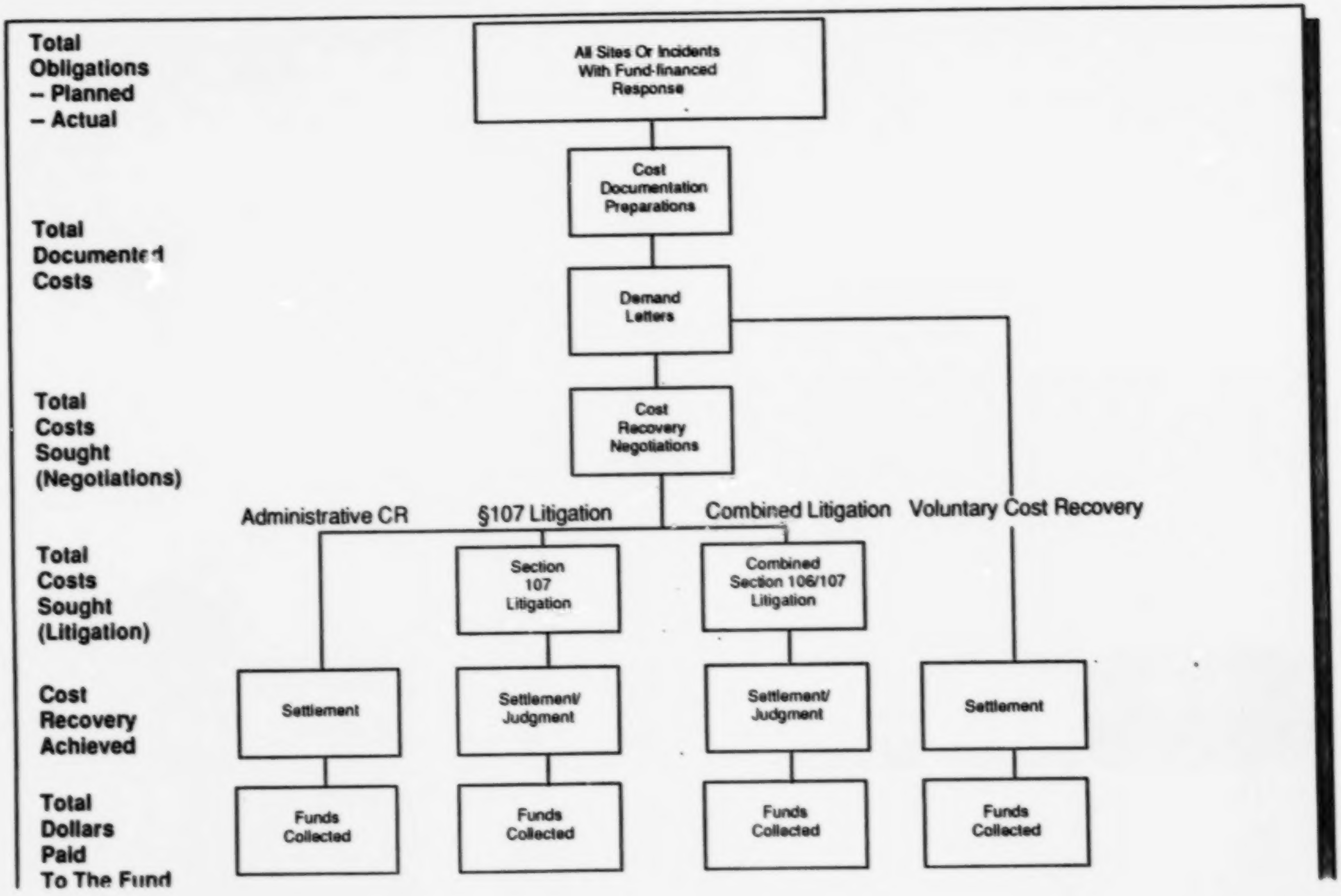
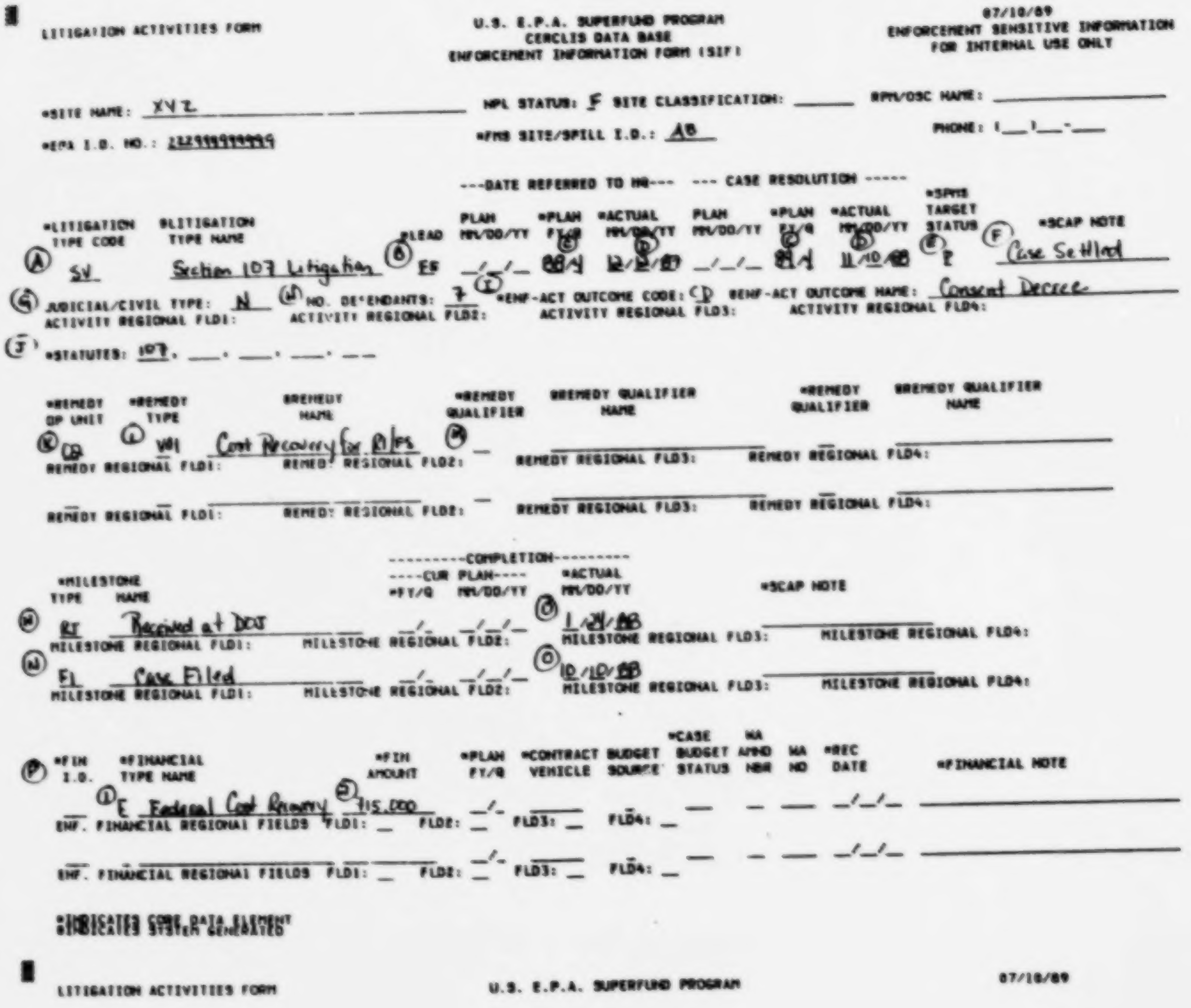


Exhibit XII-6(1)

Sample SIF for Cost Recovery Actions



LITIGATION ACTIVITIES FORM

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS DATA BASE
ENFORCEMENT INFORMATION FORM (SIF)

07/10/89
ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*SITE NAME: XYZ
NPL STATUS: F SITE CLASSIFICATION: ____
RPM/OSC NAME: ____
*EPA I.D. NO.: 222999999999
*FMS SITE/SPILL I.D.: AB
PHONE: (___)___-___

			---DATE REFERRED TO HQ---			--- CASE RESOLUTION -----				
*LITIGATION TYPE CODE	@LITIGATION TYPE NAME	@LEAD	PLAN MM/DD/YY	*PLAN FY/Q	*ACTUAL MM/DD/YY	PLAN MM/DD/YY	*PLAN FY/Q	*ACTUAL MM/DD/YY	*SPMS TARGET STATUS	*SCAP NOTE
Ⓐ SV	Section 107 Litigation	Ⓑ ES	_/_/_	Ⓒ 88/4	Ⓓ 12/12/87	_/_/_	Ⓒ 89/1	Ⓓ 11/10/88	Ⓔ 2	Ⓕ Case Settled

Ⓖ JUDICIAL/CIVIL TYPE: N Ⓗ NO. DEFENDANTS: 7 Ⓘ *ENF-ACT OUTCOME CODE: CD @ENF-ACT OUTCOME NAME: Consent Decree
ACTIVITY REGIONAL FLD1: ACTIVITY REGIONAL FLD2: ACTIVITY REGIONAL FLD3: ACTIVITY REGIONAL FLD4:

Ⓙ *STATUTES: 107, ___, ___, ___, __

*REMEDY OP UNIT	*REMEDY TYPE	@REMEDY NAME	*REMEDY QUALIFIER	@REMEDY QUALIFIER NAME	*REMEDY QUALIFIER	@REMEDY QUALIFIER NAME
Ⓚ 00	Ⓛ V01	Cost Recovery for RI/FS	Ⓜ _	____	_	____

REMEDY REGIONAL FLD1: REMEDY REGIONAL FLD2: REMEDY REGIONAL FLD3: REMEDY REGIONAL FLD4:

REMEDY REGIONAL FLD1: REMEDY REGIONAL FLD2: REMEDY REGIONAL FLD3: REMEDY REGIONAL FLD4:

		---------COMPLETION---------			
		----CUR PLAN----			
*MILESTONE TYPE	NAME	*FY/Q	MM/DD/YY	*ACTUAL MM/DD/YY	*SCAP NOTE
Ⓝ RT	Received at DOJ	_/_	_/_/_	Ⓞ 1/24/88	____
Ⓝ FL	Case Filed	_/_	_/_/_	Ⓞ 10/10/88	____

MILESTONE REGIONAL FLD1: MILESTONE REGIONAL FLD2: MILESTONE REGIONAL FLD3: MILESTONE REGIONAL FLD4:

*FIN I.D.	*FINANCIAL TYPE NAME	*FIN AMOUNT	*PLAN FY/Q	*CONTRACT VEHICLE	BUDGET SOURCE	*CASE BUDGET STATUS	NA AMND NBR	NA NO	*REC DATE	*FINANCIAL NOTE
Ⓟ __	Ⓠ E Federal Cost Recovery	Ⓡ 715,000	_/_	____		__	_	__	_/_/_	____
__	____	____	_/_	____		__	_	__	_/_/_	____

ENF. FINANCIAL REGIONAL FIELDS FLD1: _ FLD2: _ FLD3: _ FLD4: _

ENF. FINANCIAL REGIONAL FIELDS FLD1: _ FLD2: _ FLD3: _ FLD4: _

*INDICATES CORE DATA ELEMENT
@INDICATES SYSTEM GENERATED

LITIGATION ACTIVITIES FORM U.S. E.P.A. SUPERFUND PROGRAM 07/10/89

Exhibit XII-6(2)

Sample SIF for Cost Recovery Actions

LITIGATION ACTIVITIES FORM

U.S. E.P.A. SUPERFUND PROGRAM
CERCLIS DATA BASE
ENFORCEMENT INFORMATION FORM (SIF)

07/10/89
ENFORCEMENT SENSITIVE INFORMATION
FOR INTERNAL USE ONLY

*ACTIVITY TYPE: SV &ACTIVITY NAME: Section 107 Litigation
*OCEM CASE NAME: Acme Toxic Waste Producer
*OCEM CASE NUMBER: 9999
*DOJ CASE NAME: Acme
*DOJ CASE NUMBER: 99-9-999

(CSC) ACTION	COMMENT GROUP NUMBER	COMMENT LINE NUMBER	COMMENTS
____	__	_	________________
____	__	_	________________
____	__	_	________________
____	__	_	________________

*ACTIVITY TYPE: ___ &ACTIVITY NAME: ________________
*FINANCIAL ID: __ *FINANCIAL TYPE: _ &FINANCIAL NAME: ________________

(CSC) ACTION	COMMENT GROUP NUMBER	COMMENT LINE NUMBER	COMMENTS
____	__	_	________________
____	__	_	________________
____	__	_	________________
____	__	_	________________

*ACTIVITY TYPE: ___ &ACTIVITY NAME: ________________
*MILESTONE TYPE: __ &MILESTONE NAME: ________________

(CSC) ACTION	COMMENT GROUP NUMBER	COMMENT LINE NUMBER	COMMENTS
____	__	_	________________
____	__	_	________________
____	__	_	________________
____	__	_	________________

*INDICATES CORE DATA ELEMENT
&INDICATES SYSTEM GENERATED

- Administrative order (upon execution of last signature by EPA or the PRP)
- Administrative settlements
- Bankruptcy settlements (by payment)
- Recovery of oversight costs (upon billing).

See the annual SCAP Manual for more complete information.

Case budget money needed to support cost recovery referrals should be entered as a planned obligation (financial type of G), and a financial amount should be the amount of funds needed to support the activities associated with the case for the fiscal year. If no specific information is available use the pricing factor times the number of ongoing quarters. As a reminder, funds for expert witnesses are provided to DOJ through the IAG.

IV. REFERENCES

Regulation

54 FR 23174 "Arbitration Procedures for Small Superfund Cost Recovery Claims" (May 30, 1989).

Policies

OSWER Directive 9835.0, "Interim CERCLA Settlement Policy" (December 1984).

OSWER Directive 9832.5, "Policy on Recovering Indirect Costs in CERCLA section 107 Cost Recovery Actions" (June 1986).

Comptroller Policy Announcement 87-17, "Interest Rates for Debts Recoverable Under the Superfund Amendments and Reauthorization Act of 1986" (September 1987).

Guidance

OSWER Directive 9832.3-1A, "Cost Recovery Actions/Statute of Limitations" (June 1987).

OSWER Directive 9832.1, "Cost Recovery Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)" (August 1983). [This guidance is also referred to as "The 1983 Cost Recovery Guidance"].

OSWER Directive 9832.0, "Cost Recovery Referrals" (August 1983).

OSWER Directive 9832.12, "Guidance on Cost Recovery Strategy" (July 1988).

OSWER Directive 9832.11, "Guidance on Documenting Decisions Not to Take Cost Recovery Actions" (June 1988).

OSWER Directive 9832.12, "Guidance on Federal Superfund Liens" (September 1987).

OSWER Directive 9833.3A, "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989).

OSWER Directive 9834.10, "Interim Guidance on Notice Letters, Negotiations, and Information Exchange" (October 1987).

OSWER Directive 9834, "Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA" (June 1987).

OSWER Directive 9012.10-A, "Revision of CERCLA Civil Judicial Settlement Authorities Under Delegations 14-13-B and 14-14-E" (June 1988).

OSWER Directive 9832.6, "Small Cost Recovery Referrals" (July 1985).

FMD, "Historic Site-Specific Cost Reports in Superfund Contracts Active Prior to October 1, 1985" (June 26, 1989).

FMD, "State Superfund Financial Management and Record-Keeping Document " (August 1987).

OARM, "Superfund Financial Management and Recordkeeping: Guidance for Federal Agencies" (January 1989).

OECM, "Draft CERCLA RD/RA Settlement Negotiations Checklist" (January 1988).

OWPE, "Draft Guidance on Reimbursement of Oversight Costs" (June 1988).

OWPE, "Draft Guidance on Landowner Liability and Settlements under Section 122(g)(1)(B) of CERCLA."

OSWER Directive 9834.4-A, "Guidance on Use and Enforcement of Information Requests and Administrative Subpoenas" (August 1988).

OSWER Directive 9835.9 "Guidance on Landowner Liability under Section 107(a)(1) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA and Settlements with Perspective Purchasers of Contaminated Property" (June 6, 1989).

OECM, "Draft Guidance, Procedures for Administrative Settlements under Sections 122(h)(1) and (4) of CERCLA" (October 1987).

OECM, "Draft Procedural Guidance on Treatment of Insurers Under CERCLA" (November 1985).

Office of the Administrator, "Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases" (August 1987).

OECM, "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties" (May 1987).

"Revised Hazardous Waste Bankruptcy Guidance" (May 1986).

OSWER Directive 9834.3-2a "PRP Search Supplemental Guidance for Sites in the Superfund Remedial Program" (June 16, 1989).

Manuals

OSWER Directive 9834.6, Potentially Responsible Party Search Manual (August 1987).

"OSWER Directive 9832.0-1A, Procedures for Documenting Costs in CERCLA section 107 Actions (January 1985) [also referred to as "The Cost Documentation Procedures Manual"].

OARM, Superfund Indirect Cost Manual (March 1986).

Contacts

The CERCLA Enforcement Division's Technical Support Branch: (FTS) 382-5612.

Cost recovery referral: Attorney Advisors, Waste Division of OECM: (FTS) 475-7735.

Appendix

Site Litigation Management Plan

(This plan should be prepared in close coordination with the Department of Justice and should incorporate other guidance, as appropriate, including the Model Litigation Report, Negotiations Checklist and Pre-Referral Negotiations Procedures.)

1. Litigation Schedule and Staffing Requirements

   a. Provide a schedule for completing litigation activities (including activities, staff and contractor support).

   b. Summarize the specific team responsibilities for managing and performing litigation, along with dates for starts and completions.

   c. Assess enforcement progress to date in the litigation plan.

2. Objectives of Litigation

   a. Discuss litigation objectives set by the site team and the reasons for their selection.

   b. Identify the potential alternatives (e.g., return to negotiation posture or different legal options to achieve litigation objectives).

3. Litigation Strategy

   a. Identify the initial and bottom-line litigation points in the plan and reasons for the postions.

COMMUNITY RELATIONS

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
Techniques for Effective Community Relations 1

II. PROCEDURES AND INTERACTIONS 3

A. Community Relations Plan (CRP) 3
Coordination with Enforcement Staff 3
Consistency with Enforcement Actions 3
B. Potentially Responsible Party (PRP) Involvement 4
Notice to PRPs 4
Negotiations 4
C. Community Relations During Removal Actions 5
D. Community Relations During Remedial Actions 5
Community Relations Following an RI/FS Order 6
Proposed Plan and Public Comment 6
Public Notice and Comment on Consent Decrees for RD/RA 7
Community Relations During PRP Remediation 8
E. Other Enforcement Actions 8
Injunctive Litigation 8
Cost Recovery 8
F. Administrative Record 9
Purpose of the Administrative Record 9

III. PLANNING AND REPORTING REQUIREMENTS 11

A. SCAP 11
Range of Activities 11
Range of Costs 11
B. Case Budget 12

IV. POTENTIAL PROBLEMS/RESOLUTIONS 13

A. Volatile Public Meeting 13
B. Lack of Community Interest 13
C. PRP Involvement 13
D. PRP as Principal Employer 13

V. REFERENCES 14

Guidance 14
Memorandum 14
Manuals 14
Training 14
Contacts 14

COMMUNITY RELATIONS

I. DESCRIPTION OF ACTIVITY

Introduction

A site-specific and well-planned community relations effort is an integral part of every Superfund response. The Superfund community relations program promotes two-way communication between members of the public, including PRPs, and the lead government agency responsible for response actions. Activities are conducted throughout the planning and implementation of Superfund responses to encourage communication between government staff and the public. Exhibit XIII-1 illustrates the relationship of community relations activities to the Superfund technical process.

Through experience with the Superfund program, EPA has found that its decision-making ability is enhanced by actively soliciting comments and information from the public. This chapter discusses community relations when an enforcement action is initiated or on-going at an enforcement or PRP-lead site.

Techniques for Effective Community Relations

There are many techniques that can be used in a site-specific community relations program. EPA has found that there can be no set formulas in deciding which techniques to use. Each community is different. The issues of importance to the public, the level of concern, the history of public involvement, and the socio-economic background of the community vary from site to site. Community relations efforts must, therefore, be tailored to the distinctive needs of each community. They must also be tied to the technical response schedule and enforcement considerations for the site. Some general recommendations, however, for dealing with the community include:

- Create the perception and actualization of an open process
- Involve the community early in the process
- Provide more information rather than less
- Encourage bi-monthly or quarterly meetings in areas of intense community awareness.

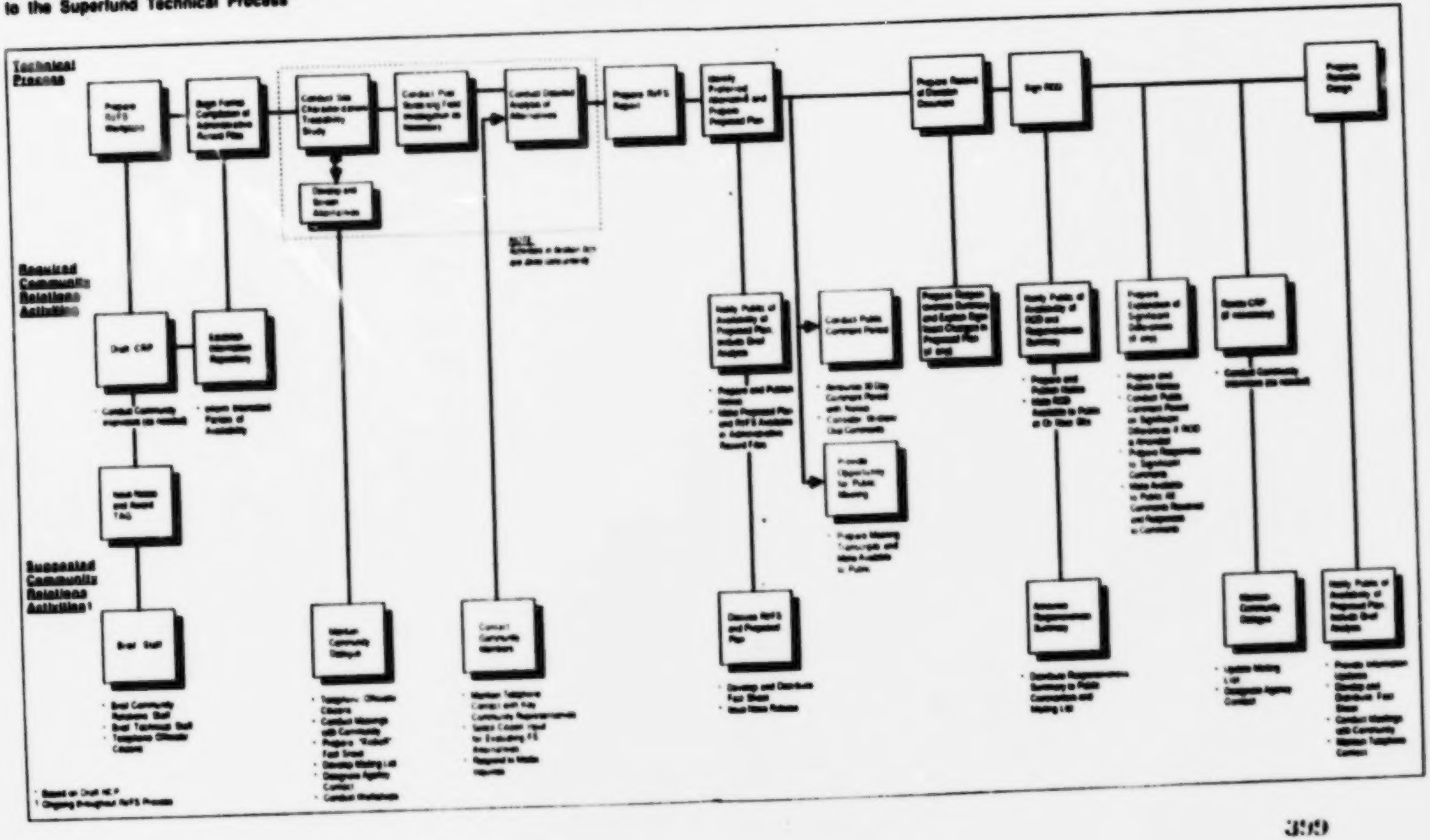
Specific techniques for ensuring open and candid communication include small group or one-on-one meetings, and frequent telephone calls. Fact sheets, public meetings, newsletters and press releases also are often appropriate to ensure citizen understanding of issues and activities associated with a response. When large public meetings are needed, they must be very carefully planned to enhance productive communication. The timing, benefits and limitations of each technique are described in depth in OSWER Directive 9230.0-03, Community Relations in Superfund: A Handbook (March 1988), Appendix A. (Hereafter referred to as the Community Relations Handbook).

The formal plan for EPA community relations activities at a Superfund site as required by the NCP is the Community Relations Plan (CRP). This plan provides an overview of the community relations program planned for a site; the historical, geographical, and technical details explaining why the site is on the NPL; a description of the community and its involvement with the site; details on community relations approaches to be taken; and the timing of suggested activities. There are typically two appendices to the CRP: a mailing list of interested parties and suggested locations for meetings and information repositories.

For enforcement sites, EPA Regional offices are responsible for developing community relations plans and associated activities. In cases in which EPA has negotiated an order with responsible parties, EPA is designated as the lead agency for community relations. If the State negotiates the order, then the State will have the lead for community relations, with EPA oversight. However, the conduct of community relations at State-lead sites is negotiable with EPA. The following sections of this chapter highlight these responsibilities by describing:

- Procedures and interactions of key community relations players during enforcement actions
- Planning and reporting requirements for community relations during enforcement actions
- Potential problems that may arise during community relations activities, and potential resolutions.

Exhibit XIII-1
Relationship of Community Relations Activities to the Superfund Technical Process*


Technical Process
Required Community Relations Activities
Suggested Community Relations Activities¹
Prepare RI/FS Workplan
Begin Formal Compilation of Administrative Record File
Conduct Site Characterization/ Treatability Study
Develop and Screen Alternatives
Conduct Post Screening Field Investigation (if necessary)
Conduct Detailed Analysis of Alternatives
Prepare RI/FS Report
Identify Preferred Alternative and Prepare Proposed Plan
Prepare Record of Decision Document
Sign ROD
Prepare Remedial Design
Draft CRP
Establish Information Repository
Conduct Community Interviews (as needed)
Inform Interested Parties of Availability
Issue Notice and Award TAG
Brief Staff
Brief Community Relations Staff
Brief Technical Staff
Telephone Officials/ Citizens
Maintain Community Dialogue
Telephone Officials/ Citizens
Conduct Meetings with Community
Prepare "Kickoff" Fact Sheet
Develop Mailing List
Designate Agency Contact
Conduct Workshops
Contact Community Members
Maintain Telephone Contact with Key Community Representatives
Solicit Citizen Input for Evaluating FS Alternatives
Respond to Media Inquiries
NOTE: Activities in broken box are done concurrently
Notify Public of Availability of Proposed Plan; include Brief Analysis
Prepare and Publish Notice
Make Proposed Plan and RI/FS Available in Administrative Record Files
Conduct Public Comment Period
Announce 30-Day Comment Period with Notice
Consider Written/ Oral Comments
Provide Opportunity for Public Meeting
Prepare Meeting Transcripts and Make Available to Public
Discuss RI/FS and Proposed Plan
Develop and Distribute Fact Sheet
Hold News Release
Prepare Responsiveness Summary and Explain Significant Changes in Proposed Plan (if any)
Notify Public of Availability of ROD and Responsiveness Summary
Prepare and Publish Notice
Make ROD Available to Public at Or Near Site
Announce Responsiveness Summary
Distribute Responsiveness Summary to Public Commenters and Mailing List
Prepare Explanation of Significant Differences (if any)
Prepare and Publish Notice
Conduct Public Comment Period on Significant Differences if ROD is Amended
Prepare Responses to Significant Comments
Make Available to Public All Comments Received and Responses to Comments
Revise CRP (if necessary)
Conduct Community Interviews (as needed)
Maintain Community Dialogue
Update Mailing List
Designate Agency Contact
Notify Public of Availability of Proposed Plan; Include Brief Analysis
Provide Information Updates
Develop and Distribute Fact Sheet
Conduct Meetings with Community
Maintain Telephone Contact

* Based on Draft NCP
¹ Ongoing throughout RI/FS Process

II. PROCEDURES AND INTERACTIONS

A. Community Relations Plan (CRP)

Information gathered during community interviews provides the basis for the development of site-specific Community Relations Plans (CRPs). If individuals conducting the community interviews actively seek information about public concerns and informational needs, the communication activities will be better targeted to the specific needs of the people in the community. The process for conducting these interviews involves several steps, as detailed in Chapter 3 of the Community Relations Handbook.

In addition, discussions about the site should be held with Regional technical and legal staff in advance of the interviews, so that the community relations staff can be apprised of any situations that might impact these interviews. Regardless of whether viable PRPs have been identified, the RPM should participate in the community discussions.

To incorporate the full range of views, lead agency staff may consider interviewing PRPs in the community. The EPA enforcement team for the site will determine whom to interview. This team is comprised of a Community Relations Coordinator (CRC), the On-Scene Coordinator (OSC), Regional Counsel, and the RPM, as well as equivalents at the State level when the State has the lead.

Coordination with Enforcement Staff

Coordination activities among the CRC, OSC, Regional Counsel, and RPM depend on the site-specific situation. Adequate planning is crucial to prevent the release of information that might be detrimental to the settlement and/or litigation process. Community relations plans prepared for sites with viable PRPs should receive input from all members of the enforcement team who are directly affected by the scheduled activities in the CRP. For example, attorneys should review the accuracy of any legal information, the RPM should review the accuracy of any technical information, and the CRC should approve the appropriateness of the community relations techniques suggested in the CRP.

The CRC is ultimately responsible for ensuring that the community relations requirements of CERCLA are implemented. Therefore, final approval of the CRP should be by the CRC, with concurrence on specific sections by members of the team.

Consistency with Enforcement Actions

Community relations activities outlined in a CRP for an enforcement site should be consistent with the settlement process and the likely schedule of enforcement actions. Community Relations staff may wish to document EPA's approach to coordinating and sharing information with PRPs within the CRP. However, any special conditions or Agency interaction with the PRPs should be spelled out in the administrative order or consent decree, not in the CRP.

The public must be told early on if PRPs are willing to participate in implementing the CRP. The Community Relations staff can do this by preparing a fact sheet or disclosing information at a public meeting. Discussions about the PRPs prior to signing a consent agreement, however, may cause delays in the negotiations. It is preferable to delay discussing details of PRP involvement with the site until some agreement is signed or action taken. Premature disclosures may cause tension and mistrust between Agency staff and the PRP.

Assuming a site has not been referred for litigation, the CRP needs to inform the public of the possibility of litigation. Litigation generally does not occur until after the remedy is selected. EPA staff, therefore, may need to explain at public meetings or in fact sheets that pending or planned litigation may impose constraints on the release of certain information or conduct of community relations activities. Community Relations staff may choose to describe the litigation process, and discuss the potential effects of litigation on the scope of community relations activities. If the site is referred later for litigation, the CRP should be modified to provide that statements about the litigation, other than public information that can be ascertained from court files, be cleared with the Department of Justice before issuance. The Regional Counsel team members will be the focal point for that clearance, as well as for consulting with DOJ on statements concerning site status, such as investigations, risk assessments and response work. The plan will be amended to reflect any potential effects this could have on community relations activities.

B. Potentially Responsible Party (PRP) Involvement

EPA is the lead agency for developing and implementing community relations activities at an EPA "PRP-lead" site. A PRP may assist in the implementation of community relations activities at the discretion of the Regional office. The Regional office, however, will oversee PRP community relations implementation. Specifically, PRPs may be involved in community relations activities at sites where they are conducting either the RI/FS, or the RD/RA, or both. If a PRP will be involved in community relations activities, the CRP should reflect that involvement. In these cases, the PRP(s) may wish to participate in public meetings, or in the preparation of fact sheets. EPA, however, will not "negotiate" with PRPs on the contents of press releases, fact sheets, or other documents distributed for public consumption.

Notice to PRPs

Notice letters are used to inform PRPs of their potential liability and provide an opportunity for them to enter into negotiations, which are intended to result in PRPs conducting or financing response activities. The negotiation process is discussed in detail in Chapter V, RI/FS Negotiation/Settlement and Chapter VIII, RD/RA Negotiation/Settlement.

Negotiations

Negotiations are generally conducted in confidential sessions between the PRPs and the Federal Government. Neither the public, nor the technical advisor (if one has been hired through a technical assistance grant by a community) may participate in negotiations between EPA, DOJ and the PRPs unless everyone agrees to allow such participation. Otherwise the ability of the parties to assert confidentiality at some later date may be affected.

Special educational efforts should be conducted prior to PRP negotiations to inform the public that little if any information regarding negotiations will be available to the public during negotiations.

The confidentiality of statements made during the course of negotiations is a well-established principle of the American legal system. Its purpose is to promote a thorough and frank discussion of the issues between the parties in an effort to resolve differences. Confidentiality not only limits what may be revealed publicly, but also ensures that offers and counter-offers made in the course of negotiations may not and will not be used by one party against the other in any ensuing litigation.

PRPs may be unwilling to negotiate without the guarantee of confidentiality. They may fear public disclosure regarding issues of liability and other sensitive issues that may damage their potential litigation position or their standing with the public. This expectation of confidentiality necessarily restricts the type and amount of information that can be made public. Community relations staff should consult with and obtain the approval of other members of the technical enforcement and Regional Counsel team before releasing any information regarding negotiations. If the site has been referred or is in litigation, DOJ approval should also be obtained.

C. *Community Relations During Removal Actions*

EPA encourages public participation during removal actions to the extent possible. However, removal actions may not always allow the same degree of participation as remedial actions. By their nature, the situations that require emergency removals do not allow for extensive public involvement. Adjustments to the community relations process must be made to accommodate necessary time constraints. The proposed NCP requires a public comment period of at least 30 days for removals with a planning period of six months or more before the initiation of on-site activity. For removals with a planning period of less than six months before the initiation of on-site activity, a public comment period may be held when appropriate. The public comment period, if held, begins when the administrative record file is made available for public inspection.

The enforcement program encourages PRPs to conduct or pay for removal actions. At any time, the Agency may arrive at an agreement with the PRPs to conduct a removal, which usually is embodied in an Administrative Order on Consent (AOC). EPA also may issue a Unilateral Administrative Order (AOU) to compel PRPs to undertake a removal or other action. In addition, under limited circumstances, the Agency may refer the action to DOJ, seeking a court order to secure the removal.

A unilateral administrative order or administrative order on consent is a public document and should be made available to the affected community, through the Administrative Record file. In addition, community relations staff, the RPM, and ORC should discuss the terms of the order with and describe the removal action to citizens, local officials, and the media. If the PRP subsequently fails to respond to the order, any public statements or information releases regarding the status of actions at the site or prospective EPA actions should first be cleared with appropriate Regional technical and legal enforcement personnel.

D. *Community Relations During Remedial Actions*

Community relations activities should be planned as early in the enforcement process as possible. Generally this occurs before issuing an RI/FS special notice letter. Meetings with small groups of citizens, local officials and other interested parties are extremely helpful for sharing general information and resolving questions. These meetings also may serve to provide information on EPA's general enforcement process.

Distribution of general Superfund public information materials, such as the fact sheet, "The Superfund Enforcement Process: How it Works," may be beneficial to community relations efforts. A discussion of how EPA encourages settlements also may be appropriate at this time.

Community Relations Following an RI/FS Order

RI/FS settlements usually are resolved as AOCs, which do not normally require public comment opportunities. However, the RI/FS workplan triggers the implementation of CR activities. When the workplan is complete, a "kick-off" meeting with the public may be conducted in order to present the final workplan and explain next steps. If held, program and community relations staff should make it clear that EPA approved the workplan; announce how the PRP will be performing the RI/FS; explain EPA's confidentiality requirements; and explain where the Administrative Record files will be or are located. The Administrative Record file should be available at a central Regional location, and at or near the site. If a public meeting is held it should also be documented in the Administrative Record files. Since it contains information that the lead Agency used in selecting a final remedy, the Administrative Record file should be used as a tool to facilitate public involvement.

Proposed Plan and Public Comment

Once the RI/FS has been completed, the Agency will issue the proposed remedial action plan, and publish a notice summarizing the plan and announcing a public comment period on both the RI/FS and the proposed plan. At a minimum, the notice must be published in a major local newspaper of general circulation. A formal comment period of not less than 21 calendar days must be provided for the public to submit oral and written comments. Note that proposed revisions to the National Contingency Plan (NCP) suggest extending this period for a minimum of 30 calendar days.

CERCLA requires that an opportunity for a public meeting be offered during the comment period, and that a transcript of the meeting on the proposed plan be available to the public. The transcript must be made available to the public in the Administrative Record file, and may be placed in the information repositories and distributed on request. Chapter 4 of the Community Relations Handbook outlines these specific public participation requirements.

Once the public comment period on the proposed plan has closed, a Responsiveness Summary is prepared that serves two purposes. First, it provides lead agency decision-makers with information about community preferences regarding both the remedial alternatives and general concerns about the site. Second, it demonstrates how the comments of members of the public were taken into account as an integral part of the decision-making process. A Record of Decision (ROD) is then issued by EPA as the final remedial action plan for a site. Both the ROD and the Responsiveness Summary are placed in the Administrative Record file and information repositories. In addition, the Responsiveness Summary may be distributed to all those who commented, and to the entire site mailing list. Chapter 4 of the Community Relations Handbook provides further information on requirements for public notice and availability of the ROD and Responsiveness Summary.

Public Notice and Comment on Consent Decrees for RD/RA

If a negotiated settlement for remedial action under CERCLA section 106 is reached, it will be embodied in a consent decree to be entered by the court. CERCLA section 122(d)(1) requires the use of consent decrees as the vehicle of agreement between the Federal Government and PRPs on remedial actions taken under section 106 of CERCLA. CERCLA section 122 contains specific public participation requirements. DOJ lodges the consent decree with the court, publishes a notice of the proposed consent decree in the Federal Register (FR), and offers an opportunity for non-signatories to the agreement to comment on the proposed consent decree before its entry by the court as a final judgment. The public comment period must be not less than 30 calendar days in length. During that time, the consent decree may be withdrawn or modified if comments demonstrate it to be inappropriate, improper or inadequate.

In order to ensure that public comment opportunities are extended to interested parties, EPA staff routinely prepares a press release to be issued after the consent decree has been lodged as a proposed judgment with the court. DOJ should notify Regional Counsel for the particular site and provide a copy of the FR notice of the decree. Regional Counsel should inform the RPM and CRC of this event. Community relations staff can then mail copies of the press release or copies of the FR notice to persons on the site mailing list. The press release should indicate where copies of the consent decree may be obtained. The procedures for public comment on the consent decree, as well as a contact name for obtaining further information should also be announced. The public notices and press releases for the consent decree may be combined, if appropriate.

Communications with the public should focus on the remedial provisions of the settlement agreement. Details of the negotiations, such as the behavior, attitudes, or legal positions of PRPs, any compromises incorporated in the settlement agreement, and evidence or attorney work-product material developed during negotiations, must remain confidential.

If a negotiated settlement for RD/RA results in actions fundamentally different from those selected in the Record of Decision (ROD), the ROD will have to be amended. An amendment to a ROD also requires a public comment period, which should coincide, if possible, with the comment period for the consent decree. Comments must be addressed in the Responsiveness Summary for the ROD Amendment, not the consent decree.

A public meeting may be held during the public comment period on the consent decree, at the site team's discretion. Regional staff must offer the opportunity for a public meeting when there are significant community issues or concerns, or for other reasons which are determined by and based upon the judgment of EPA Regional staff. If held during the public comment period, these meetings need to be documented, and significant oral comments received during the meeting must be addressed in a Responsiveness Memorandum on the consent decree.

Once the public comment period on the proposed consent decree has closed, DOJ staff, in cooperation with EPA staff, consider each significant comment and write the Responsiveness Memorandum. Assuming that EPA and DOJ continue to believe the decree should be entered, DOJ will then file a Motion to Enter with the court, together with the Responsiveness Memorandum, the comments received, and the consent decree itself. The Responsiveness Memorandum and Motion to Enter the consent decree are released to the public at the same time. The Regional team will use information repositories, Administrative Record files, and/or other means to make these documents available to the public.

Community Relations During PRP Remediation

EPA retains responsibility for community relations during a PRP-managed cleanup conducted pursuant to a consent decree or other enforcement order. The scope and nature of community relations activities will be the same as for Fund-lead response actions. When PRPs participate in community relations activities at the site, EPA and PRP roles need to be determined and explicitly defined. Where a PRP has not been involved in the initial stages of implementing the community relations plan, but shows sufficient interest, commitment, and capability to warrant some level of participation, EPA should re-evaluate its role in conducting community relations activities. In that case, a new CRP may be developed at the discretion of the Regional team. PRP roles in conducting community relations may be addressed in the consent decree or other enforcement orders.

E. *Other Enforcement Actions*

Section 122(i) of CERCLA requires the lead Agency to publish a notice of proposed settlements for administrative orders on consent under section 122(g)(4) (de minimis settlements) and under section 122(h) (cost recovery settlements/arbitration). The notice published in the Federal Register must identify the facility concerned and the parties to the proposed settlement. A public comment period of not less than 30 days is required for these agreements. Regional staff should provide notice (e.g., a press release, a notice to persons on the site mailing list, or an advertisement in the newspaper of local circulation) to supplement the FR notice. For further information on response to comments see Chapter 6 of the Community Relations Handbook.

Injunctive Litigation

At any point in the enforcement process, a case may be referred to DOJ for litigation, and community relations activities may change in scope. If litigation is initiated early in the enforcement process, the CRP for the site may need to be modified substantially. If litigation is initiated late in the process (e.g., after the conclusion of the RD/RA special notice moratorium) the plan will require only the addition of the litigative process.

When a case has been referred to DOJ, community relations activities at the site should be re-evaluated by the site team, and changes necessary to accommodate confidentiality should be agreed upon by the site team, including DOJ. See Chapter 6 of the Community Relations Handbook for information on changes in public disclosure.

Cost Recovery

If a Fund-financed cleanup is conducted, EPA may initiate litigation to recover the costs of response. Since cost recovery generally follows removal actions or initiation of remedial action, community interest in the site usually will have lessened, unless other operable units remain to be addressed.

A spokesperson chosen by the site team, in coordination with DOJ, should take the lead in responding to inquiries regarding current site conditions. All inquiries regarding litigation should be forwarded to the EPA cost-recovery team, which will prepare a response with the approval of DOJ.

F. Administrative Record

Section 113(k)(1) of CERCLA requires the establishment of an Administrative Record file upon which the selection of a response action is based. It also requires that a copy of the Administrative Record file be located at or near the site. Section 113(k)(2) of CERCLA requires that the Agency promulgate regulations outlining procedures for interested persons to participate in developing the Administrative Record file. The Agency is addressing these statutory requirements through revisions to the NCP and accompanying guidance documents.

From the remedial investigation through the selection of remedy, the Administrative Record file will be available for public inspection at a central Regional location and at or near the site. The information in the file is crucial to the public in that it contains the information upon which the lead Agency bases its decisions toward selecting a final remedy. The site team should use the Administrative Record file as a tool for facilitating public involvement.

Publicly-available documents concerning response selection must be made available to all interested parties at the same time. EPA staff should avoid situations in which local residents are provided opportunities to review and comment on site information while other members of the public are not provided the same opportunities. Similarly, if EPA requests PRPs to review a plan, EPA should enable other members of the public to review that plan as well. When a kick-off meeting is scheduled, the public, including residents and PRPs, should be invited.

The Administrative Record file and CRP for a remedial action should be made available to the public no later than the time the remedial investigation phase begins, which is usually when the final RI/FS work plan is approved. The timing for establishing the Administrative Record file for a removal action will depend on the nature of the removal. As outlined in the proposed NCP, for removals with a planning period of at least six months before on-site activities will be initiated, the record file must be made available to the public when the engineering evaluation/cost analysis (EE/CA) or its equivalent is available for public comment. For removals with a planning period of less than six months, the record file must be available to the public no later than 60 days after the initiation of on-site cleanup activity.

Purpose of the Administrative Record

The Administrative Record has a two-fold purpose. First, the record provides an opportunity for the public to be involved in the process of selecting a response action. During the selection of a response action, information is reviewed and made available in the publicly accessible Administrative Record file. Second, the Administrative Record represents the information that was available to and considered by the Agency at the time of its decision. If the Agency is challenged concerning the adequacy of a response action, judicial review of a response action selection will be limited to the Administrative Record. A complete Administrative Record for judicial review will allow the Agency to avoid costly and time-consuming litigation over response selection. The public should be advised that comments must be submitted in a timely manner in order to be considered.

The CRC's duties concerning the relationship of the Administrative Record file to the information repositories, public notices, and public comments are described in Chapter 6 of the Community Relations Handbook. Additional information on the roles of the CRC, OSC, RPM, and Regional Counsel in the development and maintenance of the Administrative Record can be found in Chapter XV, Records Management and in OSWER Directive 9833.3A "Interim Guidance on Administrative Records for Selection of CERCLA Actions" (March 1, 1989).

III. PLANNING AND REPORTING REQUIREMENTS

A. SCAP

SCAP planning activities take place at the beginning of each fiscal year. The site team, including the RPM, CRC, and Regional attorney decide the course of community relations activities for each site by quarter. For PRP-lead sites, enforcement case budget (described below) provides funding for community relations.

Site-specific characteristics and the level of contractor involvement are key factors affecting the costs of community relations programs at Superfund sites. The unique features of each Region and the specific characteristics of each site necessitate individualized community relations programs. Such differing programs in turn require changes in the level of involvement of a community relations contractor from site to site.

Range of Activities

The range of activities conducted for Superfund community relations may include developing brochures, writing CRPs, interviewing members of the community, preparing fact sheets, organizing information repositories, organizing public meetings, issuing public notices, developing ROD responsiveness summaries, holding small group meetings, translating information for communities and conducting workshops. The use of contractors to conduct any of these activities is left to the discretion of the Regions in general and the site team in particular.

Range of Costs

As stated above, the range of costs varies from site to site. Higher costs can be expected at sites that are more complex, and, thus, more time consuming. A lack of EPA staff for technical support has created a demand for contractors to assist in conducting community relations activities. This assistance will have to be considered when establishing budgets for community relations support at Superfund sites.

A variety of conditions and circumstances may influence the costs of performing community relations activities at Superfund sites. The following factors may influence the level of contractor involvement and costs of community relations activities:

- Different Regional preferences and expectations
- Political, social, and economic differences among sites
- Level of technical complexity
- Stage of the remedial response action
- Level of public involvement
- Size of geographic area
- Extent of travel requirements
- Amount of other direct costs
- Time allowed to prepare a deliverable.

Exhibits XIII-2 and XIII-3 illustrate the site-specific nature of community relations activities and costs. These exhibits outline unique factors that should be considered in determining the cost of community relations activities. For additional information on the cost of contractor support for community relations activities, see the January 6, 1988 Memorandum from the Office of Emergency and Remedial Response entitled, "Using the Range of Contractor Costs for Superfund Community Relations Activities (FY 87) Matrix."

B. Case Budget The enforcement case budget provides funds for community relations for RI/FS and RD/RA activities when a PRP-lead is expected. The CRP should be funded concurrently with the RI/FS negotiations and can be combined into one Technical Enforcement Support contract (TES) work assignment. Community relations implementation (CRI) should be funded concurrently with the RI/FS oversight work assignment. A revised CRP should be funded concurrently with the RD/RA negotiations and CRI for the RD/RA oversight. The enforcement case budget does not fund community relations at Federal, State or Federal-Enforcement lead sites. The community relations lead should be designated as RP for activities funded by the enforcement case budget.

Exhibit XIII-2

Range Of Contractor Costs For Superfund Community Relations Activities (FY 87)

Activity	Range of Possible Contractor Tasks	Typical Range of Level of Effort (LOE) in Hours*	Typical Range of Costs*	Factors Affecting Costs	Examples	Examples (continued)
COMMUNITY RELATIONS PLAN (CRP): Formal plan for EPA community relations activities at a Superfund site	• **Background Review** Meet with agency technical staff Review agency files Research local newspaper files • **Planning and Conducting Community Interviews** Develop contact list Schedule interviews Conduct on-site interviews Conduct on-site research • **Design CR Program** Identify citizens' concerns Select techniques and approaches • **Prepare CRP** Aid in drafting the text Prepare maps and exhibits Oversee graphic designs Develop mailing list Assist EPA with reviews Incorporate revisions Draft thank you letters • **Contract Administration Related to CR Planning Tasks (e.g., monthly reports, meetings)**	110 225	$6,500 - $13,500 Total cost range above includes: ODC's of $300 - $2,000 for: • Travel • Phone calls • Photocopying • Mailing	Technical complexity of site Political sensitivity to site Level of public involvement Size of geographic area Size of population Quality and availability of background information Number of interviews conducted Number and length of on-site visits Extent of graphics requirements Size and format of mailing list; number of updates Extent of interagency coordination and review Extent of travel requirements	**Upper Deerfield Township Landfill site** Cumberland County, NJ Region 2 Cost: $6,500 Characteristics: Simple, direct site history Moderate community interest Cooperative local officials Average travel and per diem costs Non-controversial site Minimal revisions needed **Ott/Story/Cordova site** Muskegon County, MI Region 5 Cost: $10,000 Characteristics: Long and complex site history Technically complex site Considerable community concerns Extensive State involvement Significant media attention Above average travel and per diem costs Complex site characteristics Extensive interagency coordination and review	**Silver Bow Creek site** Butte, MT Region 8 Cost: $15,000 Characteristics: Long and complex site history Technically complex site High level of community concern Significant media attention Extensive interagency involvement Large geographical area High travel and per diem costs Complex site characteristics Minimal revisions needed

*Based on Draft NCP

Exhibit XIII-3

Range Of Contractor Costs For Superfund Community Relations Activities (FY 87)

Activity	Range of Possible Contractor Tasks	Typical Range of Level of Effort (LOE) in Hours*	Typical Range of Level of Effort (LOE) in Hours*	Factors Affecting Costs	Examples	Examples (continued)
FACT SHEETS: Brief report summarizing field and other site related activities and findings to inform the site community of EPA actions.	• **Planning** Conduct research on EPA objectives • **Production** Aid in drafting text Prepare maps/exhibits Oversee graphic designs Assist EPA with reviews Incorporate revisions Arrange typesetting and printing • **Distribution** Develop mailing list Develop delivery strategy • **Contract Administration Related to CR Planning Tasks** (e.g., monthly reports, meetings)	25 - 150	$1,500 - $9,000 Total cost range above includes ODC's of $700 - $2,500 for: • Layout and Typesetting • Graphics • Printing • Mailing • Translator	Extent of research required Complexity of information Stage of remediation process Extent of graphics requirements Extent of interagency coordination and review Printing options selected (type style, paper, colored ink, etc.) Number of revisions Length and number of fact sheets printed Time allowance for printing order (rush vs. non-rush) Translation costs	**Tucson Airport Area site** Tucson, AZ Region 9 Cost: $2,300 Characteristics: Minimal contractor involvement No graphics required Standard printing options selected Required interagency coordination and review **Marathon Battery Company site** Putnam County, NY Region 2 Cost: $3,500 Characteristics: Complex site history Minimal graphics Standard printing options selected Extensive revisions needed	**Northside Sanitary Landfill/Enviro-Chem sites** Zionsville, IN Region 5 Cost: $5,000 Characteristics: Complex site history Complex and technical information Extensive graphics requirements Extensive interagency coordination and review **New Bedford Harbor site** New Bedford, MA Region 1 Cost: $8,000 Characteristics: Prototype bilingual fact sheet Technically complex site Complex and technical information Extensive graphics Extensive printing options selected Extensive interagency coordination and review Extensive revisions needed

IV. POTENTIAL PROBLEMS/RESOLUTIONS

This section discusses specific problems that may occur during community relations activities at enforcement sites, and suggests methods for resolving these issues.

A. Volatile Public Meeting

Keeping citizens informed from the beginning of the process will help to avoid volatile situations. However, perceived health and safety concerns posed by a hazardous waste site can sometimes lead community members to react emotionally during public meetings and informational briefings. Meeting participants can become confrontational and defensive when discussing proposed solutions to a site, particularly if technical information is not completely understood. To alleviate this situation, EPA technical and legal staff may use a neutral, third-party moderator to facilitate a useful exchange of information during a meeting. A moderator can help set the tone for a meeting by setting forth guidelines at the outset. When a moderator serves as the intermediary between citizens and the lead agency, and rephrases questions posed by citizens for EPA officials to respond to, the meeting may run more efficiently.

B. Lack of Community Interest

Through initial contacts with a site community, EPA may discover that citizens have little knowledge of or interest in site activities. In this situation, it may be necessary to contact a broader group of community members to ensure that undetected concerns do not get overlooked. Additional groups that may be contacted include: clergy, League of Women Voters, civic groups, garden clubs, neighborhood associations and professional organizations. Information on these groups is usually available from the local Chamber of Commerce. If, after contacting a broad range of potential interest groups, no significant interest or concerns are identified, community relations staff should devote time to developing and implementing extensive outreach efforts.

C. PRP Involvement

As outlined in Chapter 6 of the Community Relations Handbook, PRPs may participate in community relations implementation activities. This may include developing independent fact sheets and brochures on cleanup actions. In this situation, the RPMs should make it clear to the community what materials have been produced by EPA and which have been prepared by the PRP with review by EPA. Further, RPMs should work closely with PRPs who wish to develop community relations materials to ensure that those materials receive adequate EPA review before distribution. In addition, when EPA produces a fact sheet or other outreach document, those materials should also be distributed to the PRP.

D. PRP as Principal Employer

The nature of the environmental threat and how directly a community feels affected by it generally determine the reaction of the community toward outreach activities at a site. In some situations, economic considerations of the residents can outweigh their environmental concerns. Nevertheless, the community must be informed that PRPs will be made accountable to the public for their site. RPMs should address these fears as much as possible by emphasizing EPA's desire to present the facts about the site. For example, when a PRP is the principal employer in a town, citizens may fear losing their jobs if they attend community relations meetings. Organizing meetings and interviews in such a way that citizens can comfortably express their concerns is important. It may be more appropriate to conduct telephone interviews rather than face-to-face interviews to ensure privacy. RPMs also may want to institute a site hotline or present information request forms in the newspaper to provide anonymity. These techniques may help secure the involvement of hesitant community members.

V. REFERENCES

Guidance	OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 3, 1988). OSWER Directive 9833.3, "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989).
Memorandum	Memorandum from OERR, "Using the Range of Contractor Costs for Superfund Community Relations Activities (FY 1987) Matrix" (January 1988).
Manuals	OSWER Directive 9230.0-3B, Community Relations in Superfund: A Handbook (March 1988). OSWER Directive 9200.3-01B, Superfund Comprehensive Accomplishments Plan (SCAP) Manual (October 1, 1988).
Training	"Community Relations in Superfund: Concepts and Skills for Response Staff." For additional information, call FTS 475-6647. Community Relations During the ROD Training Course.
Contacts	Office of Waste Programs Enforcement, CERCLA Enforcement Division, FTS 382-4842. Regional Community Relations Coordinator.

STATE ENFORCEMENT

I. DESCRIPTION OF ACTIVITY 1

Introduction 1
Background Information 1
Enforcement Authorities 1

II. PROCEDURES AND INTERACTIONS 2

A. The Role of the State and EPA in PRP Oversight 2
B. Cooperative Agreements and Core Program Funding 3
C. Development of the CA 3
D. Sections in a CA Application 4
E. Development of the SMOA 5
F. Articles in a SMOA 5
G. EPA Approval of State Remedies; Counting State RA Starts 7

III. PLANNING AND REPORTING REQUIREMENTS 9

A. SCAP 9
  Site Classification 9
B. CERCLIS 10
  Activity Leads 10
  Event Leads 10
C. Case Budget 11

IV. POTENTIAL PROBLEMS/RESOLUTIONS 13

A. Forum Shopping by PRPs 13
B. Overseeing State Oversight of PRPs 13
C. SCAP Targets 13
D. Standard Planning Time Line 13
E. SMOA Development 13

V. REFERENCES 14

Policy 14
Regulation 14
Guidance 14
Manual 14
Contacts 14

STATE ENFORCEMENT

I. DESCRIPTION OF ACTIVITY

Introduction

This chapter focuses on State involvement in the Superfund enforcement process. The organization of this chapter reflects the sequence of events that occur prior to and during the development and implementation of State enforcement actions. This information should be used in conjunction with other available EPA guidance documents that are cited throughout the chapter.

Background Information

Participation of States in the effort toward meeting the statutory requirements for Remedial Action (RA) starts is important as both Federal- and State-lead sites can be counted toward the RA start goals set forth in SARA.

CERCLA requires EPA to include States in the enforcement process. However, before reauthorization, CERCLA did not contain a framework for EPA to involve States. CERCLA now provides for State involvement in selection of remedies and negotiations. EPA's intent is to obtain more cleanups by PRPs through State enforcement.

This section focuses on the State enforcement process by describing these two major components of the program:

- Authorities available for Federal and State enforcement, and
- CERCLA State enforcement strategy.

These areas are discussed in the following sections.

Enforcement Authorities

Section 121(f) of CERCLA, as amended by SARA, requires EPA to provide for substantial and meaningful involvement by States in the selection, development, and initiation of remedial actions undertaken within their boundaries. Section 121(f)(2)(C) of CERCLA, however, preserves EPA's right to settle without State concurrence. CERCLA does not preclude States from pursuing enforcement actions under State law in the absence of formal agreement with or lead designation by EPA. Coordination of State and Federal efforts occurs when:

- States participate in Federal-lead enforcement actions under section 121(f) of CERCLA
- States act under their own authority as lead agency, with concurrence and support of EPA through Superfund Memoranda Of Agreement (SMOA) and Cooperative Agreements (CAs)
- States act under their own authority as lead agency, absent a SMOA or CA, through participation in "Annual Consultation" (see 40 CFR Section 300.515 (h)(i)).

II. PROCEDURES AND INTERACTIONS

To assist EPA and individual States operating together in the Superfund program, it is preferable to have clearly defined processes and procedures for coordination and interaction. While either the Federal government or States may conduct enforcement actions against PRPs without the other's involvement, it is in both the State's and EPA's best interests to coordinate such actions. Coordination is possible either through a CA or a SMOA.

This section of the chapter introduces and explains the development of State enforcement efforts through a description of the following:

- Roles that States and EPA play in PRP oversight
- Authorities for use of Cooperative Agreements and Superfund Memoranda of Agreement
- Procedures for developing a Superfund Memorandum of Agreement
- Procedures for developing a Cooperative Agreement.

These topics are discussed at length in this portion of the chapter.

A. *The Role of the State and EPA in PRP Oversight*

An effective enforcement program requires a balanced approach that relies on a mix of Fund-financed cleanup, consent orders/decrees reached through formal negotiations, and where necessary, litigation. The general nature of EPA and State interaction in pursuing PRP site cleanup commitments can best be illustrated through a discussion of required oversight roles for States and EPA as well as available funding schemes.

The role of States in oversight of PRPs conducting Remedial Investigation/Feasibility Study (RI/FS) and Remedial Design/Remedial Action (RD/RA) should depend on whether the State or EPA negotiated and entered into an Administrative Order (AO) or Consent Decree (CD). If the State negotiated the AO or CD, then the State should have the lead for oversight of the PRP's response activity. It is also in the State's best interest to oversee the PRP's work, since the State is responsible for maintaining the quality of the response.

States should obtain a commitment from the PRPs to pay for oversight costs. States should attempt to obtain this commitment prior to requesting funds from EPA or drawing on monies already awarded in a CA. When oversight costs are reimbursed by PRPs at the end of the year or at completion of the response action, EPA funds can be used to the extent available as described in OSWER Directive 9831.6, "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites" (April 7, 1988).

The scope of EPA funding generally excludes funds for States to hire contractors for oversight tasks unless the State provides adequate justification for their use. Furthermore, EPA will not fund States to conduct oversight tasks that duplicate EPA's efforts. Guidance for determining whether to fund a State for oversight of a PRP response action can be found in OSWER Directive 9831.1-1A, "CERCLA Funding of Oversight of PRPs by States at NPL Sites" (April 17, 1988).

If EPA negotiated the AO or CD, then oversight of PRP response activity is the Agency's responsibility. In this case, the State may receive funding for its support. Support agency Cooperative Agreements involve review tasks and are explained in Volume I of the EPA manual, State Participation in the Superfund Program.

States may also be involved in three-party agreements (EPA/State/PRP). Generally, the Agency does not encourage three-party agreements for every site as resource duplication may occur. Yet, this is a viable option where two governmental entities work together.

B. *Cooperative Agreements and Core Program Funding*

Section 104(d)(1) of CERCLA authorizes the use of a Cooperative Agreement (CA) or a contract as the funding instrument for support of State-lead enforcement actions in accordance with the criteria and priorities of the NPL. These agreements are the required mechanisms for obtaining necessary State information and certified assurances before Federal funds can be used by the State to conduct an enforcement action. See OSWER Dir. 9831.6, "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites" (April 17, 1988) for detailed information.

A Cooperative Agreement is a legally binding agreement between EPA and an assistance recipient. CAs are usually site-specific but there are options for multi-site enforcement CAs.

Core Program CAs expand the range of activities eligible for funding. Core Program funding provides funds to a State to conduct CERCLA implementation support activities that are not assignable to specific sites, but are intended to develop and maintain a State's ability to participate in the CERCLA response program. Such activities include general program management and supervision to support CERCLA activities, CERCLA program inter-agency coordination, legal assistance relating to implementation of CERCLA, fiscal and contract management to support the CERCLA program, and general clerical and administrative support. Detailed information on Core Program funding is provided in OSWER Directive 9375.2-01, "State Core Program Funding Cooperative Agreements" (December 12, 1987). Existing requirements associated with site-specific funding are detailed in the manual, State Participation in the Superfund Program.

C. *Development of the CA*

In developing State-enforcement CAs, EPA requires that States document their ability to perform the response action and enforcement. When the State submits a CA application, EPA and the State have already designated the site as a State-lead enforcement site. The Region evaluates the State's ability to conduct the response action and the ability to exist as lead enforcement agency. The following section describes the steps for developing a CA.

Detailed information on the following provisions can be found in "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL sites," and in the EPA manual State Participation in the Superfund Program.

D. ***Sections in a CA Application***

The sections that must be included in a CA application are listed below; detail is provided on those related to State enforcement.

- Legal Authority -- Documents that adequate enforcement authorities are available. (A SMOA could also suffice in ensuring that adequate enforcement authorities are available). The previously mentioned capability assessment would provide this information.
- State Officials -- Indicates whom the State has chosen to serve as lead agency remedial project manager and lead attorney for the site.
- Consistency with EPA Policy and Guidance -- Indicates what EPA policy and guidance the State shall apply when pursuing enforcement actions for PRP searches, issuing notice letters and negotiating with PRPs, and conducting administrative and judicial enforcement actions against PRPs.
- Consistency with CERCLA Section 122 -- Provides that State settlements will be consistent with certain CERCLA section 122 provisions and related EPA Superfund Policy when negotiating and settling with PRPs under a CA. (While States can avail themselves of equivalent procedures, they are not authorized by EPA to use section 122 when pursuing enforcement actions under their own authorities). Additional guidance to address specifically the relation of CERCLA section 122 settlement procedures and related policy to State enforcement actions is being developed.
- Negotiation Time Frames -- Assures that the State will notify EPA if a settlement is not reached within 90 days of issuance of special notice for RI/FS negotiations and 120 days for RD/RA negotiations; and requires that the State recommend whether negotiations should continue with the PRPs.
- Formalizing Successful Actions -- Assures that the State will culminate successful actions by entering into an enforceable order or decree, or issuing some other enforceable document requiring the PRP to conduct the response action in accordance with the NCP and relevant EPA policy and guidance.
- Central File Maintenance -- Assures that the State will maintain a central file of all documents produced, collected or issued as part of the enforcement activities funded under the CA for use in subsequent enforcement action of cost recovery activities. Guidance regarding State cost documentation and records retention requirements can be found in FMD's "State Superfund Financial Management and Recordkeeping Document" (August 1987).

Other requirements that are included in a CA application address:

- Administrative Record
- Community Relations

- Deviations from CERCLA
- Changes to Scope of Work.

CERCLA provides for Federal funding of State enforcement actions through Cooperative Agreements. Section 104 of CERCLA provides the mechanism for States to apply for these funds. The agreement for documenting the roles and responsibilities of these actions is the Superfund Memorandum of Agreement as discussed in this section. The planning and reporting requirements of these State enforcement actions is presented in section III of this chapter.

E. *Development of the SMOA*

A Superfund Memorandum of Agreement (SMOA) facilitates and documents the processes and procedures that the Region and State use when conducting site-specific response actions. A SMOA, if negotiated properly, should remain applicable to the EPA-State Superfund interaction for several years with only relatively minor modifications as changes to the relationship occur.

The SMOA concept provides a written document that is mutually approved by the Agency and State and that covers all aspects of EPA-State interaction on Superfund activities. The articles covered in the SMOA parallel the major points of State-EPA interaction set forth in the proposed revised NCP. SMOAs are used to describe the terms for the States and EPA when the State wants to become the lead agency for enforcement action at an NPL site or seek EPA concurrence on the remedy at an NPL site. A SMOA is essential when the State wants to be the lead agency for non-Fund financed enforcement actions. SMOAs, unlike CAs, are not legally binding. The SMOA identifies the extent to which EPA and the State will participate in each other's response actions and how ARARs will be identified. SMOAs and the State's responsibilities for involvement are available in OSWER Directive 9375.0-01 "Revised Draft Guidance on Preparation of a Superfund Memoranda of Agreement (SMOA)" (September 29, 1988). The Guidance presents a model SMOA suggesting language and content for later adaptation by EPA Regions and States.

F. *Articles in a SMOA*

The following paragraphs summarize material to be included in the SMOA regarding State enforcement; following this information is a listing of other important articles for inclusion in the SMOA.

- Principles -- This article summarizes the status of the State's hazardous waste problem, the status of the State's Superfund program, the roles of the lead and support agencies, as well as agreements concerning the aggressiveness of enforcement activity.
- Enforcement -- This article describes expectations for enforcement and the general nature of EPA and State interaction in pursuing PRP site cleanup commitments. The parties to the SMOA must agree in principle that:

  1. Negotiated response actions with qualified PRP's are essential to an effective program for the cleanup of NPL sites.

2. Two-party (i.e., EPA or State and PRP) settlement negotiation and execution is generally more efficient than three-party (i.e., EPA and State and PRP) negotiation and execution.

3. The State has shown adequate authority to carry out enforcement.

In addition, the parties to the SMOA must agree in practice to do the following:

4. Designate the lead and support agencies for enforcement actions at NPL sites during the annual planning process.

5. Indicate those sites where the support agency will be requested to concur on the lead agency's Record of Decision (ROD) or other decision document. EPA retains final approval authority on RODs (see ROD guidance).

6. Develop site-specific enforcement strategy outlines with timeframes during the annual planning process.

7. Set forth response action commitments and settlements with PRPs in enforceable documents indicating the lead agency responsible for all Superfund communication with PRPs.

8. Organize a meeting between the lead agency and the support agency prior to the start of negotiations with PRPs to discuss goals, starting points and bottom-line positions for negotiations.

9. Provide draft and final enforcement documents to the support agency prior to issuance to the PRPs.

10. Allow for assistance requests by lead agency to support agency at any time during the enforcement and negotiation process.

11. Have the lead agency notify PRPs of a planned RI/FS and determine their willingness and ability to conduct the RI/FS.

12. Provide the State an opportunity to be a party to any enforcement document in which it chooses to participate.

13. Recognize that the agreement does not limit the ultimate enforcement authority of EPA or the United States government.

The following articles also should be included in the SMOA as suggested in OSWER Directive 9375.0-01, "Interim Final Guidance on Preparation of Superfund Memoranda of Agreement (SMOA)" (May 8, 1989):

- Federal facilities
- Introduction and Statement of Purpose
- Agreement Concerning Roles and Responsibilities
- Lead State Agency Designation
- Site-Specific Designation of Lead/Support Agency
- Remedial Project Manager/Support Agency Coordinator Designations
- Support Agency Concurrence
- Points of Contact
- Planning/Coordination Processes
- Removal Actions
- Processes to be Defined
- Consultation, Agreement and Concurrent Processes
- Support Agency Site-Specific Review/Oversight
- Resolution of Disputes
- Exclusion of Third Party Benefits
- Negation of Agency Relationship.

Subpart K of the Proposed NCP (December 21, 1988) also addresses roles of the State, Federal facilities, and EPA in SMOAs, Interagency Agreements, and other processes.

G. *EPA Approval of State Remedies; Counting State RA Starts*

EPA does not delegate remedy selections to the States. In addition, EPA may not be bound by a State-adopted remedy unless the Regional Administrator has expressly adopted in writing a remedy that complies with Section 121.

The Agency's potential for achieving the goals of 175 new remedial action starts by October 1989 and an additional 200 by October 1991 can be optimized by including appropriate State-lead enforcement sites. This is advantageous where States have developed a willingness and ability to manage State-lead enforcement sites within reasonable timeframes.

Six criteria have been adopted for State-lead enforcement sites to count toward the 175 RA starts. They are:

- The site is on the National Priorities List (NPL)
- The site is covered by agreement between EPA and the State
- The remedial action to be performed is consistent with the cleanup standards of section 121 of CERCLA
- The Regional Administrator signs the ROD or documents in writing the finding that the State ROD (or equivalent) meets CERCLA cleanup standards
- The State and Potentially Responsible Parties (PRPs) have entered into an enforceable agreement for conduct of the remedial action or the State has issued an enforceable unilateral order with which the PRPs are complying
- The State certifies with a document or a qualified State or Federal official has documented that substantial and continuous physical on-site remedial action has commenced at the site.

These criteria for counting State-lead enforcement NPL sites toward the CERCLA section 116(e) mandate are described in OSWER Memo 9831.8, "Counting State-lead Enforcement NPL Sites Toward the CERCLA section 116(e) RA Start Mandate" (October 21, 1988). This memo outlines procedures for tracking candidate sites and long term goals for deletion of State-lead enforcement NPL sites.

References

OSWER Directive 9831.6, "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites" (April 7, 1988).

OSWER Memorandum 9375.0-01 attachment, "Interim Final Guidance on Preparation of Superfund Memoranda Of Agreement" (May 8, 1989).

OSWER Directive 9375.2-01, "State Core Program Funding Cooperative Agreements" (December 12, 1987).

OSWER Directive 9375.1-4, Volume 1, State Participation in the Superfund Program manual (July 1986).

III. PLANNING AND REPORTING REQUIREMENTS

EPA defines State-lead enforcement as those National Priorities List (NPL) sites classified by the Region as being the direct responsibility of the State. At the beginning of FY 89 there were approximately 165 NPL sites classified as State-lead enforcement.

In order to increase the contribution of State-lead enforcement sites toward the CERCLA mandate of Remedial Action (RA) starts and to encourage State enforcement activity, it is important that funding is placed where the most evident environmental results can be achieved. Moreover, the necessary coordination between the Federal Government and States can only work when funds are planned and reported for, as this section illustrates.

The following planning and reporting issues are presented in this portion of the chapter:

- SCAP process related to State enforcement
- State-lead enforcement and related mandates
- Classification of site leads
- CERCLIS and related Agency and State responsibilities
- Different types of State leads, and
- Case budget and cooperative agreement information.

Each of these topics is discussed in detail in this section of the chapter.

A. SCAP

Regions are required to report progress on State Enforcement-lead sites as they would any other site. This includes State Enforcement (SE) leads where there is Federally financed work performed by the State with a State enforcement component; and work financed by the PRP under a State order through which no EPA oversight support or money is provided (SR). (See additional detail on activity and event lead codes under section B of this chapter).

Site Classification

After a hazardous waste site is identified, EPA initiates an investigation to identify PRPs associated with the site. On the basis of this preliminary PRP search, EPA (perhaps in coordination with the State) may make an initial determination of how cleanup of the release will be managed and who will initiate enforcement actions under CERCLA. The decision to classify a site as a State enforcement-lead response is based on the site history, strength of legal evidence and the national significance of the site.

States can receive Federal funding for State-lead enforcement actions at hazardous waste sites through Cooperative Agreements (CAs), as provided for in the revised NCP.

B. CERCLIS

The relationship of States to the budgetary planning process is graphically presented in Exhibit XIV-1. The relationship begins when the Regional office together with the State determines activity and event targets for the SCAP and SPMS. These targets are reviewed by EPA Headquarters through CERCLIS and used to revise SCAP and SPMS, and to determine the case budget.

The CERCLIS system uses a series of activity and event codes to designate the lead agency. A discussion of these codes follows.

Activity Leads

A lead code must be placed in CERCLIS for all events and activities. For RI/FS, RD, RA and enforcement activities, the lead codes identify the entity performing the work. There are several possible enforcement activity leads the State may assume at a site.

The SCAP defines the following codes to designate enforcement activity leads:

- SE – SE stands for State Enforcement. This code is used to designate enforcement activities initiated by a State using its own enforcement authorities to clean up sites. Trust Fund dollars are used to pay or partially pay for the enforcement and response activities at State enforcement lead sites through Cooperative Agreements. SE could therefore be used for RI/FS and RD/RA negotiations.

- FE -- FE stands for Federal Enforcement site where Fund money is being used to pay for the enforcement activities.

Event Leads

Event types are codes for a specific response, non-response, or a support event within the Pre-Remedial, Remedial, Removal, and Community Relations components of the Superfund program.

States have a role in the following event codes:

- S -- S stands for State-lead site where events are paid with Trust Fund dollars.

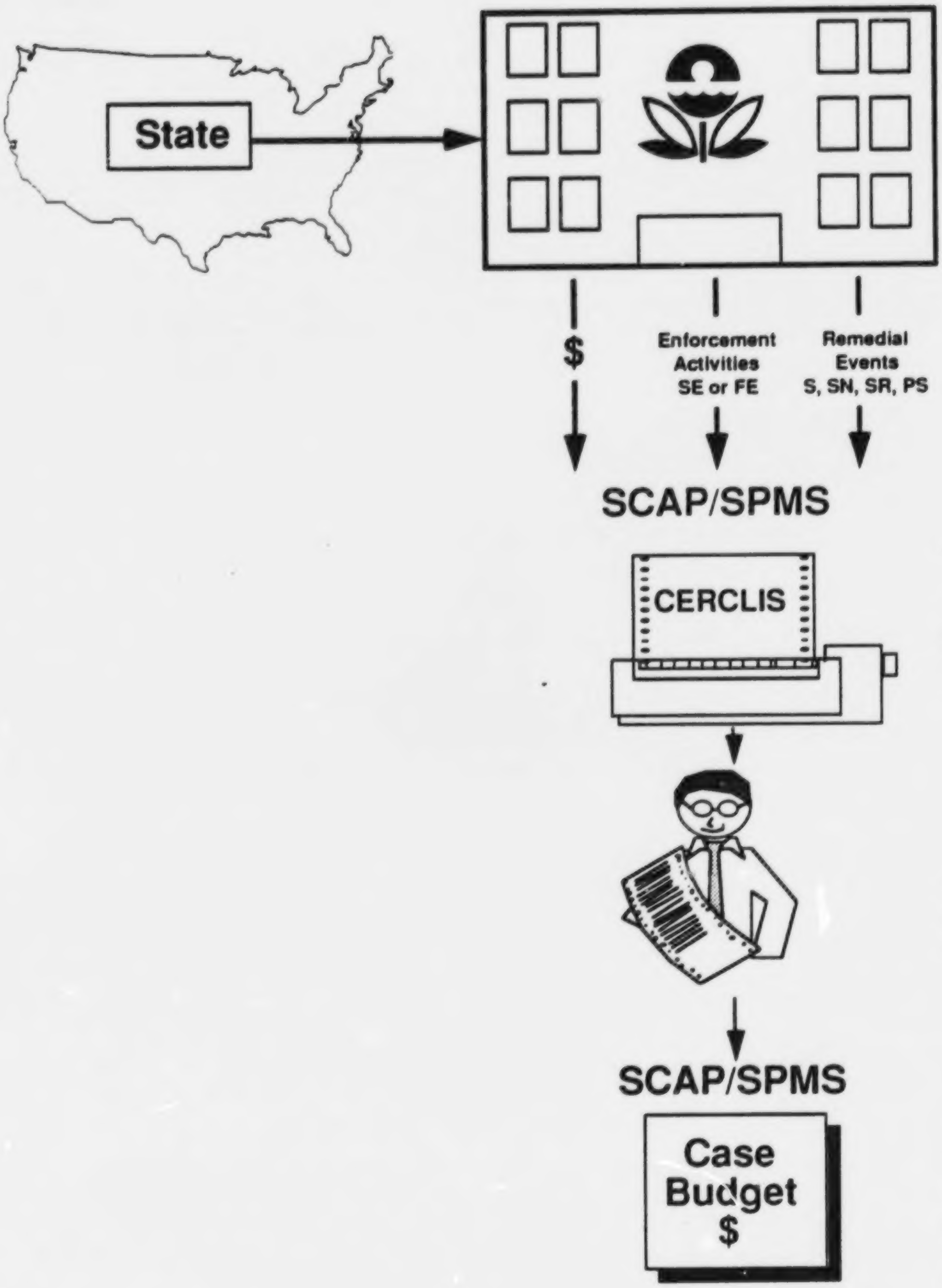
- SN -- SN is used to designate State-funded events where no Trust Fund expenditures are involved. Site events are undertaken solely by the State and paid for by State authorities. SN applies to response events (RI/FS, RD, RA, removal).

- SR -- SR stands for State Enforcement/Responsible Party Financed and is used to designate events where the State has an administrative or judicial order requiring the PRPs to do the response work. There is no Federal concurrence on the remedy i.e., SMOAs, State/EPA agreements, or cooperative agreements covering the site.

- PS -- PS is used for a PRP response under a State order, when Fund money is supporting Cooperative Agreements with States conducting State-lead oversight; or for sites not receiving Fund money that receive EPA oversight

Exhibit XIV-1

Relationship of States to Budgetary Planning Process


State
$
Enforcement Activities SE or FE
Remedial Events S, SN, SR, PS
SCAP/SPMS
CERCLIS
SCAP/SPMS
Case Budget $

State and
Region interac
to determine
budget targets
activity target:
and event leac
designation
through the
SCAP/SPMS
process

Data from
Regions
entered into
CERCLIS
system

HQ and
Regional
review of data
in CERCLIS

HQ
determines
funding level
in Case
Budget
(including
funds for
Cooperative
Agreements)

through SMOAs, State/EPA agreements or Cooperative Agreements. Money will be approved through the case budget described in the following section.

C. Case Budget The Case Budget (CB) allocation is the approved extramural funding for enforcement activities identified in CERCLIS. Funds are available to the Regions either through Headquarters contract mechanisms or the Advice of Allowance (AOA) transferred to the Regions for obligation. The allocation is divided into three categories: currently these are TES 3 and TES 4 dollars, Non-TES dollars and TES 5+. See Exhibit XIV-2 for a diagram illustrating Cooperative Agreement funding through the case budget and refer to Chapter XVI, Contracts and Case Budget, for specific case budget information.

The FY 90 OWPE case budget includes approximately $5 million to support enforcement Cooperative Agreements with States. Only Non-TES dollars are used for State enforcement CAs. This money is intended to fund State support activities during Federal-lead enforcement actions and conduct of State-lead enforcement actions (SE-lead) or oversight (PS-lead). These resources will be distributed to each Region through the OWPE AOA. Specifically, State enforcement CAs should be used to fund the following State activities:

- PRP search
- Negotiations
- Administrative or judicial enforcement
- Oversight of PRP response (RI/FS, RD, RA)
- Participation in site-specific activities in cases in which EPA has reached a settlement agreement with the PRPs.

Funds for State enforcement CAs are not intended to provide States with resources to:

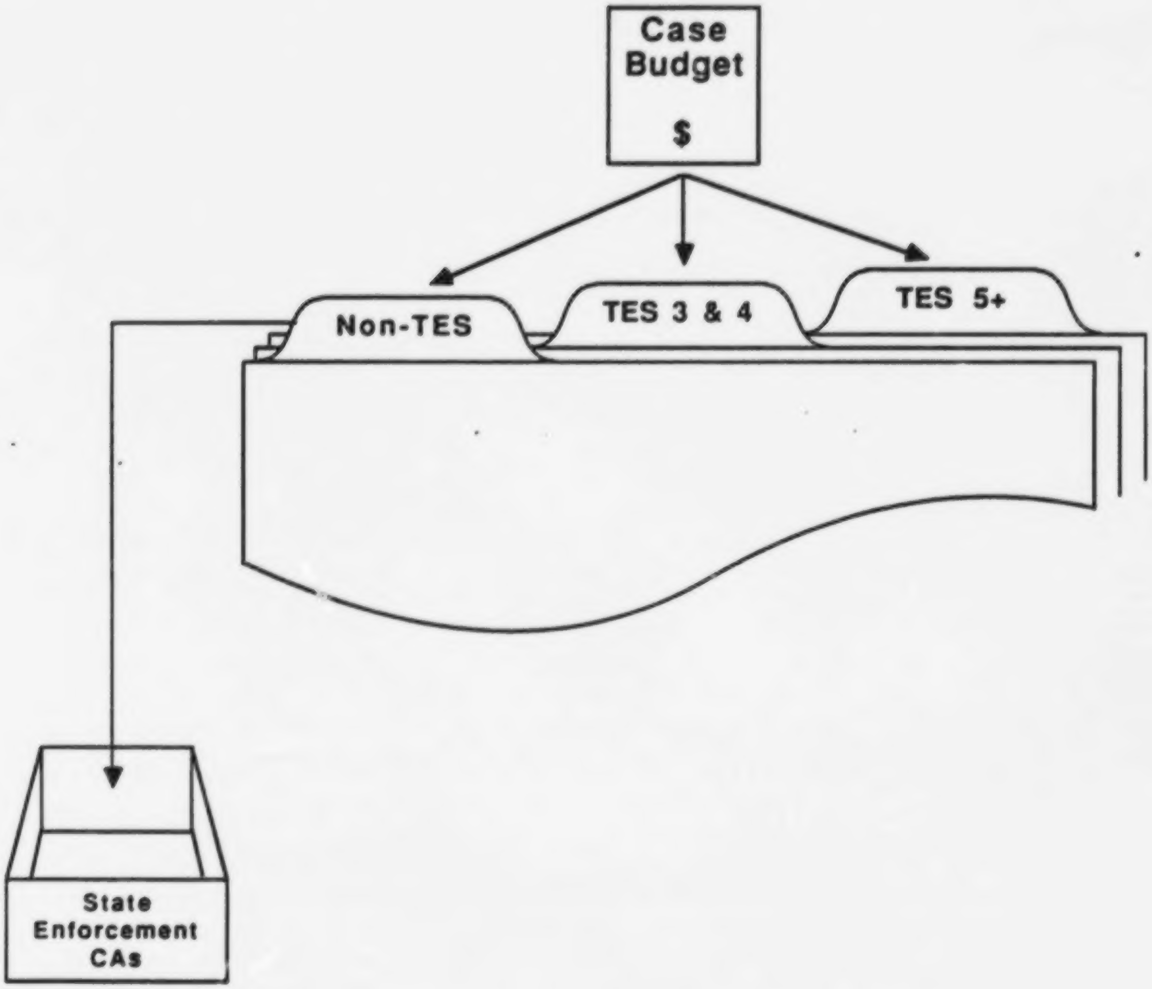
- Conduct State-lead RI/FSs, RDs, or RAs. Dollars for these events are allocated by OERR.
- Oversee PRPs at Federal-lead sites. Dollars for oversight of RP response at Fund-lead or Federal enforcement-lead sites are generally allocated from the TES contracts.
- Award community relations technical assistance grants. Allocations from these come from elsewhere within the case budget.

Three priorities have been established to help guide the Regions in planning enforcement CA resource needs in FY 89. The priorities are consistent with EPA's responsibility to meet statutory RA start requirements and with the Agency's policy of encouraging State involvement in CERCLA enforcement activities. The Regions should, when possible, use CAs to fund State support activities and State-lead enforcement activities at sites in each of the following categories:

- Sites counting toward the 175 RA start mandate
- Sites counting toward the 200 RA start mandate
- Sites in which States have shown strong enforcement interest (primarily State-lead sites). More in-depth information on these priorities can be found in the OSWER fiscal year SCAP Manual. Also refer to Chapter XVI, Contracts and Case Budget, for additional background on the development of the case budget and related Agency responsibilities.

Exhibit XIV-2

CA Funding Through Case Budget



IV. POTENTIAL PROBLEMS/RESOLUTIONS

This section discusses specific issues RPMs may confront during State enforcement activities and suggests methods for resolving these issues.

A. Forum Shopping by PRPs

This situation occurs when PRPs negotiate separately with State and Federal authorities to identify their best deal. There are advantages and disadvantages to this strategy for the PRPs: the PRP is unable to get liability releases from Federal and State authority unless a joint decree is signed (however, a joint decree doesn't guarantee releases--releases must be negotiated as part of the settlement). Moreover, PRPs should be interested in the process of deletion from the NPL. EPA can delete a site from the NPL only if the site meets standards set forth in the NCP, not if it meets a State's requirements. Therefore, RPMs need to make it clear to PRPs that it is in their best interests to work both with EPA and the State in developing a settlement.

B. Overseeing State Oversight of PRPs

To avoid delays in the project because of poor quality work, a vigorous oversight effort is necessary. The RPM must make sure the State is aggressive in its oversight efforts and should work closely with State officials to make sure the work conducted is of acceptable quality. For example, the RI/FS must be of sufficient quality to support the ROD.

C. SCAP Targets

When States delay discussions with the Regions concerning their SCAP targets, it is difficult to monitor progress. It is imperative that States be viewed as partners with the Region. With a State-lead project, EPA should work closely with the State to identify start and close dates for activities listed on the SCAP so that target figures will be accurate.

D. Standard Planning Time Line

If Regions do not complete their schedule through the RA phase, their budget will be short-changed. For planning SCAP budget projections, the RPMs should use the Standard Planning Time Line or Regional Time Line, until better planning information becomes available for projecting start and completion dates for events. These dates are critical for budget projections and could influence budget estimates.

E SMOA Development

SMOAs are not required unless the State wishes to recommend the remedy for concurrence or to be the lead agency for non-Fund financed activities at an NPL site. When the State wishes to negotiate a SMOA, EPA must do so; however, EPA may not require that the State develop a SMOA. In general, however, Regions and States should work to encourage development of SMOAs.

V. REFERENCES

Policy	Proposed NCP, Subpart K (December 21, 1988).
Regulation	40 CFR Part 35, Subpart O, "Superfund Administrative Regulation on Response Agreements" (January 27, 1989).
Guidance	OSWER Directive 9831.2, "Reporting and Exchange of Information on State Enforcement Actions at National Priorities Sites" (March 14, 1986).
	OSWER Directive 9375.0-01 attachment, "Interim Final Guidance on Preparation of Superfund Memoranda Of Agreement (SMOA)" (May 8, 1989).
	OSWER Directive 9831.8, "Counting State-lead Enforcement NPL Sites Toward the CERCLA Section 116 (e) RA Start Mandate" (October 21, 1988).
	OSWER Directive 9831.7, "Supporting State Attorneys General CERCLA Remedial and Enforcement Response Activities at NPL Sites" (June 21, 1988).
	OSWER Directive 9831.6, "Interim Final Guidance Package on Funding CERCLA State Enforcement Actions at NPL Sites" (April 7, 1988).
	OSWER Directive 9375.2-01 "State Core Program Funding Cooperative Agreements" (December 12, 1987).
	OSWER Directive 9831.3, "EPA-State Relationship in Enforcement Actions for Sites on the NPL" (October 2, 1984).
	FMD, "State Superfund Financial Management and Recordkeeping Document" (August, 1987).
Manual	OSWER Directive 9375.1-4, State Participation in the Superfund Program (July 1986).
	OSWER Directive 9355.2-1, Superfund State-lead Remedial Project Management Handbook (December 1986).
	OSWER Directive 9200.3-01B, SCAP Manual (updated annually).
Contacts	Office of Waste Programs Enforcement, CERCLA Enforcement Division, Guidance and Oversight Branch, FTS 475-9809.
	Office of Emergency and Remedial Response, Hazardous Site Control Division, State and Local Coordination Branch, FTS 382-2450.

RECORDS MANAGEMENT

I. DESCRIPTION OF ACTIVITY 1

Introduction 1

II. PROCEDURES AND INTERACTIONS 2

- A. Site Files 2
  - Remedial Site Files 2
    - File Content and Structure 2
    - Collection of Field Data 2
    - File Management Process 2
  - Removal Site Files 3
    - File Content and Structure 3
    - Site File Kit 3
    - Collection of Field Data 3
    - File Management Process 3
- B. Administrative Record Files 4
  - File Content and Structure 4
  - EPA Roles 4
  - Involvement of Other Parties 5
  - Public Participation 5
    - Remedial Actions 7
    - Removal Actions 7
  - Excluded and Privileged Information 8
  - Post-Decision Information 8
  - Compendium 9
  - Models 9
  - Certification 9
- C. Cost Documentation File 9
  - File Content and Structure 10
  - File Management Process 10
- D. Storage and Maintenance of the Records 11
  - File Maintenance 11
    - Disposition of Inactive Records 11
    - Vital Records 11

III. PLANNING AND REPORTING REQUIREMENTS 12

- A. Setting Priorities 12
- B. Planning 12
- C. Budget 12

IV. POTENTIAL PROBLEMS/RESOLUTIONS 13

- A. Space 13
- B. Transporting the Record to the Site 13
- C. ORC and RPM Involvement 13

V. REFERENCES 14

Policies 14
Guidance 14
Manuals 14
Contact 14
Training 15

RECORDS MANAGEMENT

I. DESCRIPTION OF ACTIVITY

Introduction

Records Management is critical to the success of the Superfund enforcement program. Due to the involvement of numerous Federal and State agencies, contractors, RPMs, OSCs, and PRPs at a site over a potentially extended time period, good file organization is necessary to document the site activities. Within Superfund, there are three primary areas of file management:

- The site file
- The Administrative Record file for selection of each response action
- The cost documentation file.

The site file contains all acquired site-specific information.

The Administrative Record file is a subset of the site file. As mandated by section 113(k) of CERCLA, the Administrative Record for selection of the response action contains all the documents that form the basis for the decision to select a CERCLA response action, and acts as a vehicle for public participation in the selection of the response action. Proper compilation and maintenance of the Administrative Record file is crucial because under section 113(j) of CERCLA, judicial review of issues concerning the adequacy of any response action is limited to the information contained in the Administrative Record. In-depth information on compiling the Administrative Record for selection of response actions is contained in OSWER Directive 9833.3 "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989). Note that there may be other administrative records to support other decisions taken by the Agency, e.g., a Deletion Administrative Record.

The file for cost recovery documentation consists of Headquarters and Regional documentation of expenditures, and is required to recover Fund expenditures under section 107 of CERCLA.

II. PROCEDURES AND INTERACTIONS

A. *Site Files*

The site file consists of all acquired site-specific information. There are two kinds of site files:

- **Remedial site files**, which consist of all acquired information for a remedial action, and
- **Removal site files**, which consist of all acquired information for a removal action.

This section discusses aspects of both kinds of site files, including their content and structure, the collection of field data, and file management responsibilities.

There is no one way to organize files; this chapter gives recommendations and references model file structures that are available. Regions may want to add their own file structure to this handbook.

Remedial Site Files

The RPM is responsible for developing and maintaining accurate and complete files of the activities pertaining to the site.

File Content and Structure

The remedial site file should contain all documents acquired during the remedial response. The document inventory and filing system may be based on serial identification numbered documents or other coding systems. These systems may be manual or automated. A suggested file structure with sample contents is illustrated in Exhibit XV-1.

Collection of Field Data

Site-specific data quality objectives will govern the data management methods used, and the site's Quality Assurance Project Plan/Field Sampling Plan (QAPP/FSP) will identify both field and analytic data to be acquired and the standard operation procedures to be used. A data security system must be implemented to safeguard the chain of custody records and document control for field data. Refer to OSWER Directive 9355.07A, "Data Quality Objectives for Remedial Response Activities" (March 1987) for more specific guidance.

File Management Process

The RPM must complete the appropriate forms and reports and file them according to the Regional file structure. Files must be distributed to the Regional office from the site on a regular basis and as soon as possible to assess their applicability to response selection, to determine if the documents should be copied and/or stored in the Region, and to submit financial documents for processing. Documents that are part of the Administrative Record should be copied from the site file and maintained in a separate Administrative Record file. CERCLA requires that the Administrative Record file be available to the public at or near the facility at issue. The site file, however, is generally

Exhibit XV-1(1)

Remedial Model File Structure

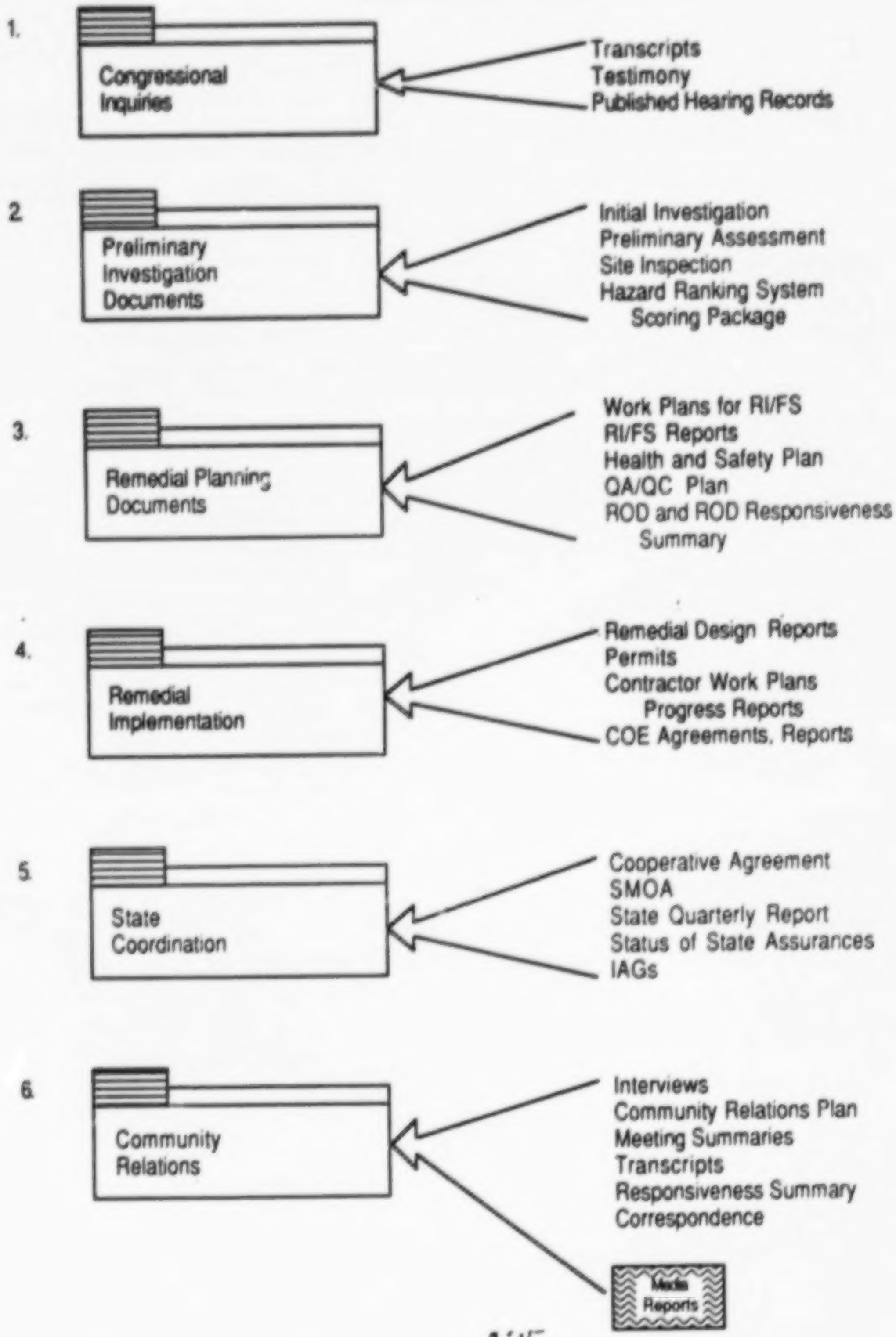
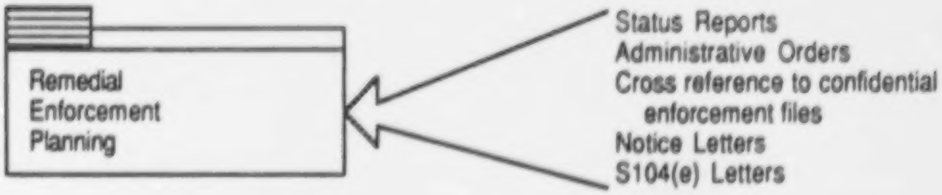


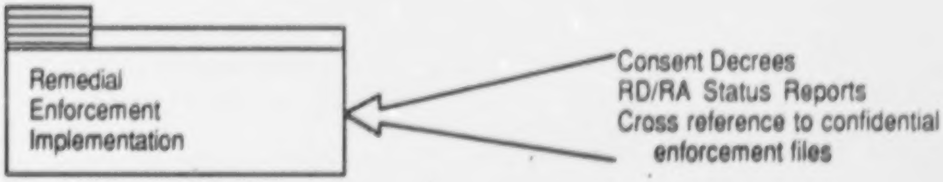
Exhibit XV-1(2)

7.

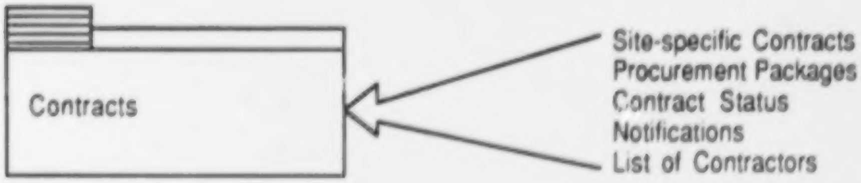
8.



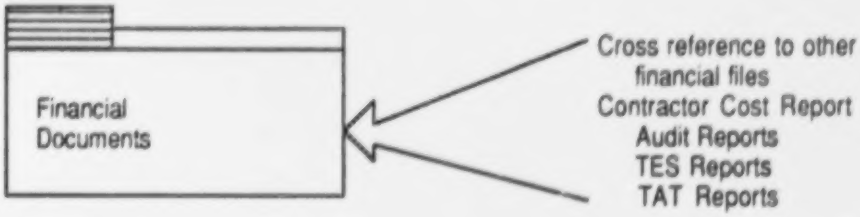
9.



10.



11.



not available for public review because it contains draft documentation and privileged materials.

Removal Site Files

Removal site file management has typically been the responsibility of the OSC, with assistance from other EPA Regional staff, Technical Assistance Team (TAT) contractors, and the U.S. Coast Guard Strike Team. Each Region must clearly assign responsibility for each of the file management functions.

File Content and Structure

Removal site files include documentation of all aspects of the removal: operational, legal, financial, community relations, and technical. Each Region should have a site file structure that can be used consistently at each site. All file structures used by the Regions should include the same minimum set of information. See Exhibit XV-2 for an example of a model file structure and component documents.

Site File Kit

The site file kit contains the items necessary to support the structured collection and storage of information at the site. Kit materials include file boxes, file folders, blank forms, time sheets, office supplies, and, if available, a personal computer. The Regional office distributes kits to OSCs, who may delegate acquisition of additional supplies to Regional administrative support personnel or the TAT. The site file kit should be transferred to the site upon project initiation. For short-term actions, the site file should be kept with the OSC. For long-term actions, the site file should remain in the command post.

Collection of Field Data

Data-gathering activities, based on site work plans or field sampling plans, are documented daily in the field logs. Guidance for quality assurance of field samples may be contained in the QA/QC Project Plans for the removal site. A data security system must be implemented to safeguard chain of custody records and document control procedures for field data.

File Management Process

Similar to RPM responsibilities for the remedial site file, the OSC must complete the appropriate forms and reports (such as Action Memoranda, work reports, and time sheets) in a timely fashion and file them according to the Regional file structure. Files must be distributed to the Regional office from the site on a regular basis and as quickly as possible to assess their applicability to the response selection, to determine if the documents should be copied and/or stored in the Region, and to submit financial documents for processing. Documents that are part of the Administrative Record should be copied from the site file and maintained in a separate Administrative Record file. The site file, unlike the Administrative Record file, need not be available for public review. The following section offers guidance on documents to be included in the Administrative Record.

B. Administrative Record Files

The Administrative Record contains the documents that form the basis for the selection of CERCLA response actions. Section 113(k)(1) of CERCLA requires that the Agency establish Administrative Records for the selection of CERCLA response actions. Section 113(k)(2) of CERCLA requires that the public have the opportunity to participate in the development of the Administrative Record. This section discusses the major requirements for the Administrative Record with regard to content and non-EPA involvement, and some specific requirements for different types of Superfund actions.

File Content and Structure

The record should consist of the documents that form the basis for the selection of a CERCLA response action, whether they support or oppose the Agency's selected action. Documents in the Administrative Record file should include relevant writings, graphs, charts, photographs, and data compilations, but the file does not include physical samples. Documents should be compiled as they are generated or received and made available at or near the site when the Remedial Investigation is begun. See Exhibit XV-3 for a sample file structure and list of documents that, if considered or relied upon for the selection of response at a site, must be included in the Administrative Record file. The list is not exclusive. The record file should contain any information on which the remedial action was based. Documents generated or received for a site, but not relevant to the response selection, should not be included in the Administrative Record file.

EPA Roles

The OSC, RPM, enforcement staff, ORC, Community Relations Coordinator, and the Administrative Record Coordinator are all involved in establishing Administrative Record files. The Administrative Record Coordinator has the duty of ensuring the adequate compilation and maintenance of the record files, but is not responsible for deciding which documents to include in the record files. Those decisions should be made by the OSC or RPM in consultation with the ORC. The following chart identifies recommended roles for Administrative Record development.

Recommended Roles for Administrative Record Development

Tasks	RPM/ OSC	RC	ARC	CRC	Contractor
Develop compilation schedule & procedures			•		
Develop maintenance & update procedures			•		
Coordinate efforts to obtain necessary documents	•	•	•	•	•
Technical/legal review of documents & index	•	•			
Screen privileged documents	•	•			
Check adequacy & completeness of AR	•	•			
Organize & photocopy documents					•
Site repository arrangements	•		•	•	
Issue public notices			•	•	

Exhibit XV-2
Removals Model File Structure

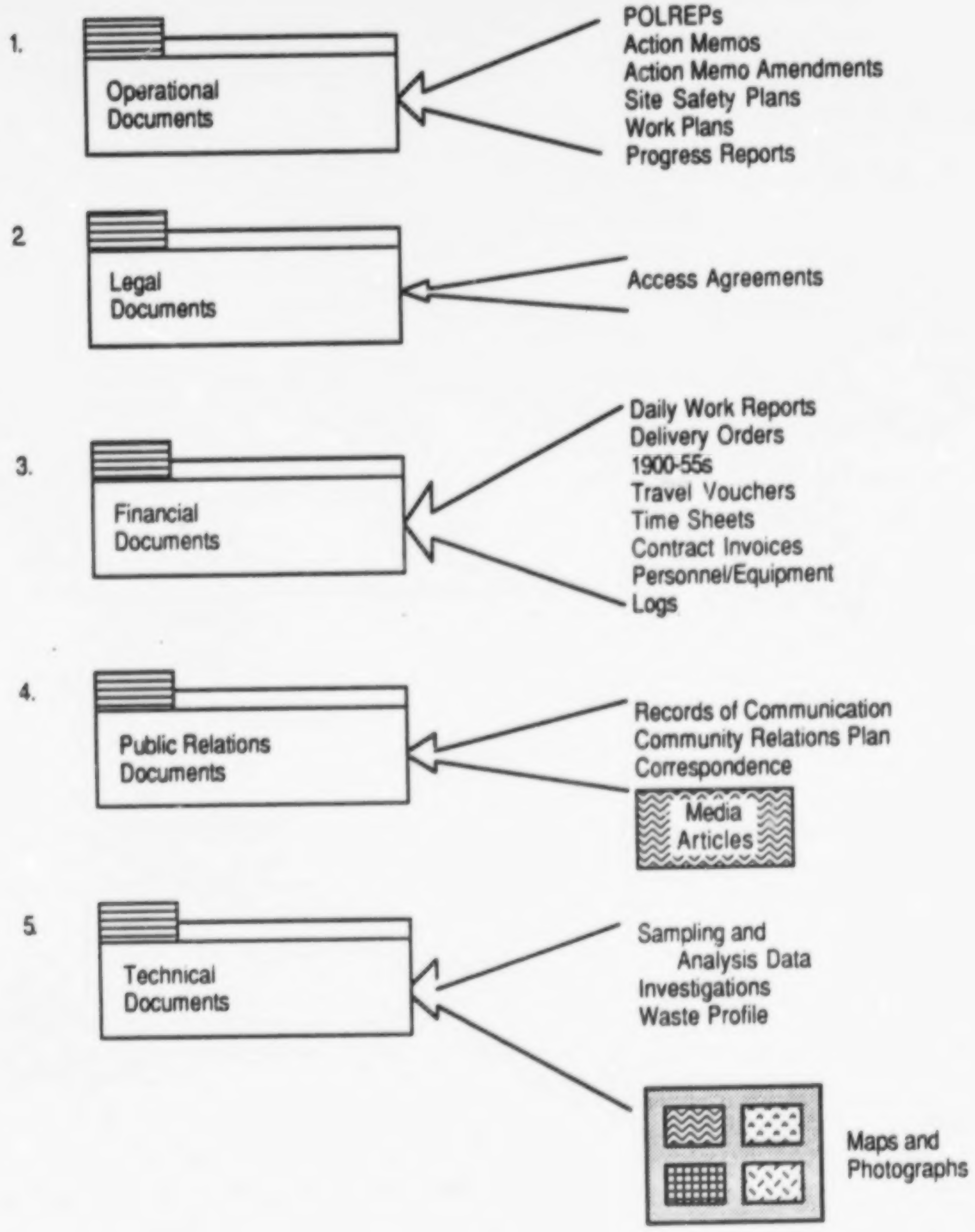
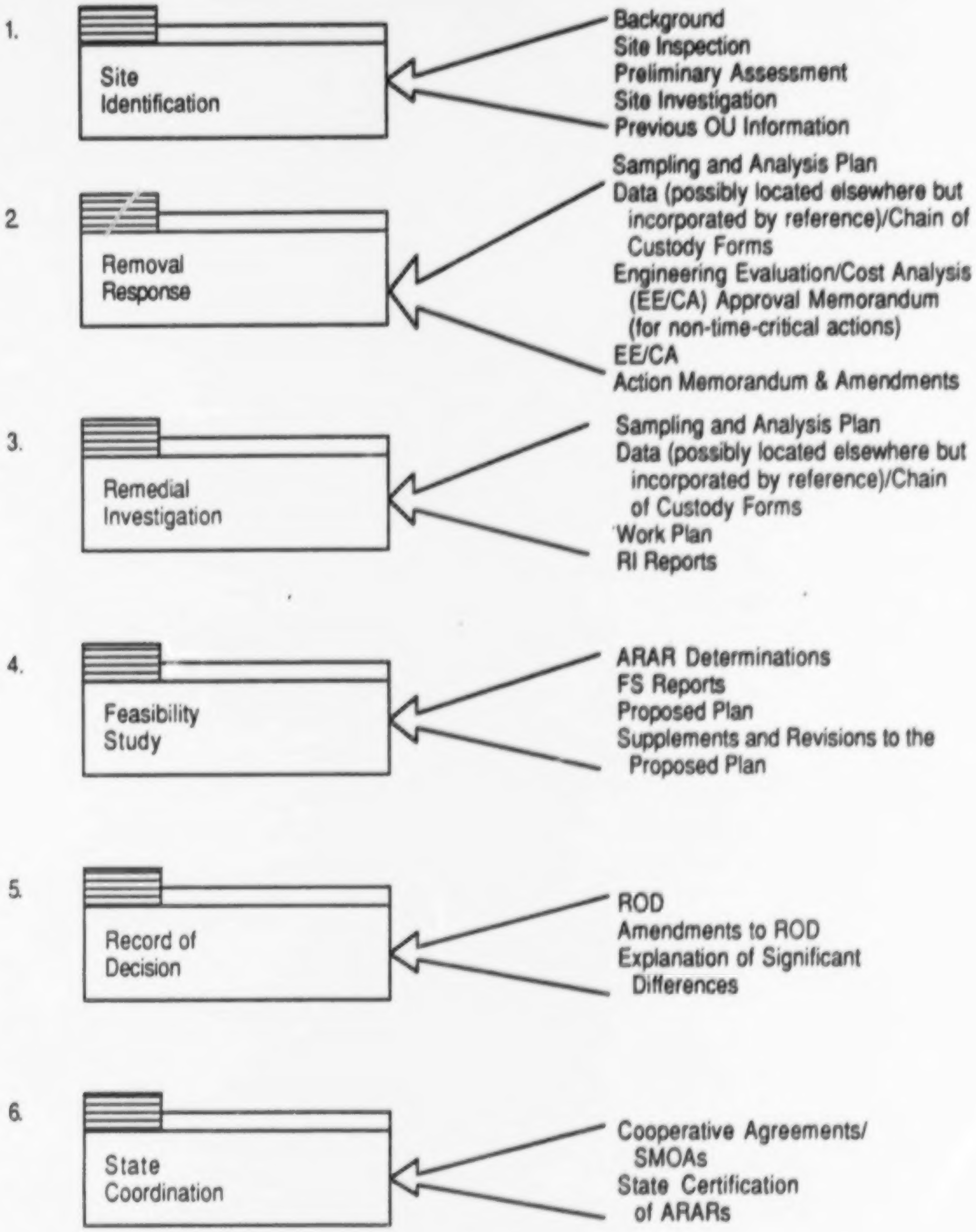


Exhibit XV-3(1)

Administrative Record Model File Structure



1. Site Identification
   - Background
   - Site Inspection
   - Preliminary Assessment
   - Site Investigation
   - Previous OU Information
2. Removal Response
   - Sampling and Analysis Plan
   - Data (possibly located elsewhere but incorporated by reference)/Chain of Custody Forms
   - Engineering Evaluation/Cost Analysis (EE/CA) Approval Memorandum (for non-time-critical actions)
   - EE/CA
   - Action Memorandum & Amendments
3. Remedial Investigation
   - Sampling and Analysis Plan
   - Data (possibly located elsewhere but incorporated by reference)/Chain of Custody Forms
   - Work Plan
   - RI Reports
4. Feasibility Study
   - ARAR Determinations
   - FS Reports
   - Proposed Plan
   - Supplements and Revisions to the Proposed Plan
5. Record of Decision
   - ROD
   - Amendments to ROD
   - Explanation of Significant Differences
6. State Coordination
   - Cooperative Agreements/ SMOAs
   - State Certification of ARARs

Exhibit XV-3(2)

7. **Enforcement Documents**
   - Enforcement History
   - Endangerment Assessments/Risk Assessments
   - Administrative Orders
   - Consent Decrees
   - Affidavits
   - Documentation of Technical Discussions with PRPs
   - Notice Letters and Responses

8. **Health Assessments**
   - ATSDR Health Assessments
   - Toxicological Profiles

9. **Natural Resources Trustees**
   - Notices Issued
   - Findings of Fact
   - Reports

10. **Public Participation**
    - Comments/Responses
    - Community Relations Plan
    - Public Notices
    - Public Meeting Transcripts
    - Fact Sheets & Press Releases
    - Responsiveness Summary
    - Late comments

11. **Technical Sources Guidance Documents**
    - EPA HQ Guidance
    - EPA Regional Guidance
    - State Guidance
    - Technical Sources

When there is a question about including certain documents in the Administrative Record file, such documents can be segregated and reviewed by the RPM and the ORC at 3- or 4-month intervals (except for removals). At critical times, such as prior to the public comment period, the issues regarding these documents should be resolved and, if appropriate, the documents included in the record file.

Each separate response action at a site (operable unit, interim action, or removal action) should be supported by an Administrative Record file, although they may be integrated into one record file if the Agency determines that the decisions are so intertwined that separate record files would be impractical. The record file must be available to the public at or near the facility at issue. Public participation in the process is discussed later in this chapter and in more detail in Chapter XIII, Community Relations.

Involvement of Other Parties

The Administrative Record file for a Federal-lead site should reflect any State involvement in the selection of a response action. For guidance on documentation of State involvement in the response selection, see OSWER Directive 9833.3, "Interim Guidance on Administrative Records for Selection of CERCLA Actions" (March 1, 1989) noted in the references at the end of this section.

Where a State has been officially designated as the "lead agency," the State must compile the Administrative Record file in accordance with section 113(k) of CERCLA. The State must transmit copies of key documents to the EPA Regional office. At a minimum, the State as lead agency must transmit a copy of the index, the RI/FS workplan, the RI/FS released for public comment, the proposed plan, and any public comments received on the RI/FS and the proposed plan. For purposes of oversight, the State should also send a copy of any risk assessment, final draft RI and final draft FS to the appropriate EPA Regional office. Agreements pertaining to the State's role and responsibilities regarding the Administrative Record should be incorporated into the Superfund Memorandum of Agreement (SMOA) or Cooperative Agreement (CA).

For Federal facilities, the lead agency has responsibility for compiling an Administrative Record file in accordance with section 113(k). At NPL sites and any other site where EPA is involved in selecting a response action at a Federal facility, the Federal agency must transmit key documents to the EPA Regional office. At a minimum, the Federal agency must transmit a copy of the index, the RI/FS work plan, the RI/FS released for public comment, the proposed plan, and any public comments received on the RI/FS and proposed plan. For purposes of oversight, the Federal agency should also send a copy of any risk assessment, final draft RI and final draft FS to EPA. Inter-Agency Agreements (IAG) should spell out procedures for compiling and maintaining the record file.

Public Participation

Section 113(k) of CERCLA specifies that the Administrative Record "shall be made available to the public." In satisfying this provision, the Agency must comply with all relevant public participation procedures outlined in sections 113(k) and 117 of CERCLA. The proposed NCP contains additional guidance (see also OSWER Directive 9230.0-3B, Community Relations in Superfund: A Handbook (March 1988) and OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities," (November 1988) referenced at the end of this chapter).

In general, the Administrative Record should document any opportunity for public involvement in the selection of a response action. All documents related to the opportunity for public involvement (e.g., notices and fact sheets), and relevant written comments received from the public should be included in the record file to establish a complete record for purposes of judicial review.

The record file should also contain information brought to the Agency's attention by the public. Reports, data and other information generated by outside parties and submitted to the Agency should be included in the record file.

The Agency should request that substantive oral comments (either in person or over the phone) be put in writing by the commentor for inclusion in the record file. The commentor should be advised that the obligation to reduce the comment to writing rests with the commentor.

The Agency may respond to comments received prior to a public comment period in various ways, depending on the nature and relevance of a particular comment. The Agency's consideration of such a comment may be in the form of a written response, or reflected by documented actions taken after receiving the comment, or even by changes in subsequent versions of documents. If the Agency responds to a comment, the response should be included in the record file.

The Agency may notify commentors that comments submitted prior to a formal public comment period must be resubmitted or specifically identified during the public comment period in order to receive formal response by the Agency. Alternatively, the Agency may notify a commentor that the Agency will respond to the comment in a responsiveness summary prepared at a later date.

Comments received during a formal public comment period must be addressed in a responsiveness summary (included with the ROD in remedial response actions). The responses may be combined by subject or other category in the record file. It should be noted that one response can be prepared to multiple comments of the same nature in order to be most efficient. Comments should be included in the record file in their original form whenever feasible. For further information, consult OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents: The Proposed Plan and the Record of Decision, Explanation of Significant Differences, and the ROD Amendment" (June 1989).

In all cases, the Agency should publish a notice of availability of the record file when the record file is first made available for public inspection in the vicinity of the site at issue. The notice should explain the purpose of the record file, its location and availability, and how the public may participate in its development. The notice should be published in a major local newspaper of general circulation in the area of the site at issue, and distributed to persons on the community relations mailing list. This notice should also be sent to all known PRPs if they are not already included on the community relations mailing list.

The availability of the record file will vary depending upon the nature of the response action. Different procedures are outlined below for remedial and removal response actions.

Remedial Actions

Section 113(k)(2)(B) of CERCLA outlines the requirements and procedures for public participation in the Administrative Record file for remedial actions. The Agency's policy, as outlined in the proposed NCP, is that the Administrative Record file for a remedial action must be established at the Regional office and made available for public inspection at a location at or near the site when the remedial investigation begins.

Removal Actions

Section 113(k)(2)(A) of CERCLA requires that EPA develop appropriate procedures for participation of interested parties in the development of an Adminstrative Record for a removal action. These requirements also are discussed in Chapter II, Removals. Procedures for each type of removal action are discussed below.

Emergency removal actions initiated within hours and lasting less than 30 days

The Administrative Record file must be made available to the public no later than 60 days after initiation of removal activity at the site. The record file must be maintained in the Regional office, but need not be made available at or near the site. Public comment on the Administrative Record file should be held when appropriate.

Other time-critical removals, including emergency removals lasting more than 30 days

The Administrative Record file must be made available to the public no later than 60 days after the initiation of removal activity at the site. The record file must be established at the Regional office and made available for public inspection at or near the site at issue. Public comment on the Administrative Record file should be held when appropriate. In general, a public comment period will be considered appropriate if cleanup activity has not been completed at the time the record file is made available to the public and if public comments might have an impact on future action at the site. A responsiveness summary on the significant comments received must be prepared and included in the record file following the public comment period.

Non-time-critical removals

The Administrative Record file must be available for public inspection when the engineering evaluation/cost analysis (EE/CA) is made available for public comment. The Administrative Record file must be available at a central Regional location and at or near the site. A public comment period of at least 30 days must be initiated. The Agency must respond to all significant comments received during the public comment period and place the comments and the responses to them in the record file.

Excluded and Privileged Information

Documents should be excluded from the Administrative Record if they contain information that is not relevant to the Agency's selection of a response action. Examples of such documents may include contractor work assignments, cost documentation information, and NPL deletion information. Information relevant to the selection of the response action that is generated or received after a decision document is signed should be kept in a post-decision file, and may be added to the record file in certain limited situations.

Some documents in the Administrative Record file may be protected from public disclosure on the basis of an applicable privilege. The RPM/OSC and ORC share responsibility for deciding which documents are privileged. Types of privilege include: deliberative process, confidential business information, attorney work product, attorney-client communication, personal privacy, and state secrets. Any privileged information that was considered or relied on to make the response action decision must be placed in a confidential portion of the record file. A short description of the information in the privileged document should be inserted in the portion of the record file available to the public, and included in the index. In situations involving attorney-client privilege and deliberative process privilege, ORC should be consulted for proper procedure.

Post-Decision Information

After a decision document is signed, information generated or received by the Agency should be placed in a post-decision document file, which is separate from the Administrative Record file. Post-decision documents may be added to the record file in limited situations:

- If the decision document does not address or if it reserves a significant aspect of the response action decision to be made at a later date. In such cases, the Agency should continue to add documents to the record file that form the basis for the unaddressed portion of the decision.

- If there is a significant change in the remedy selected in the decision document. These changes may be addressed in an explanation of significant differences.

- If the submitted documents contain changes that fundamentally alter the basis of the overall response action. Such changes will require an amended decision document.

- If the submitted documents contain significant information, not contained elsewhere in the file, that could not have been submitted during the public comment period and substantially support the need to significantly alter the response action.

Post-decision information may also be added to the record file if the Agency holds public comment periods after the selection of the response action. The Agency may hold additional public comment periods or extend the time for submission of public comment on any issue concerning response selection. All significant comments submitted during such comment periods, along with any public notices of the comment period, transcripts of public meetings, and Agency responses to the comments, should be placed in the record file.

Compendium OSWER Directive 9833.4, "Compendium of CERCLA Response Selection Guidance Documents" (May 1989) is a collection of guidance documents that are frequently used in the selection of a CERCLA response action. Not all of the documents listed will be used for the selection of remedy process at every site. The index of the record file must indicate which documents were used for that particular site as well as identify where those guidance documents may be obtained. The index to the compendium is included as appendix B to Chapter VII, Selection of Remedy.

Models Models of the Administrative Record file structure, index, certification, and notice of public availability are available as guidance for their preparation. See the documents listed at the end of this chapter.

Certification Generally, formal certification of the Administrative Record is required only if and when the selected remedy becomes the subject of litigation. Such certification should be signed by the Regional Administrator's designee after consultation with ORC and DOJ. Any certification of the record should be made by program staff and not legal staff.

Although not required, the Region may choose to have the Administrative Record Coordinator certify that the record was compiled and maintained in accordance with applicable Agency regulations and guidance. Such certification would attest that the record was compiled in accordance with current Agency procedures and would not address the completeness of the record file.

C. *Cost Documentation File* Cost documentation is a cooperative effort among the RPM, OSC, other case team members, the Regional Financial Management Office (FMO), Headquarters' Financial Management Office (HQ-FMO), OWPE, and DOJ.

For the Agency to litigate cost recovery actions successfully under section 107 of CERCLA, proper documentation is essential. The Agency bears the burden of proving three elements for cost recovery:

- Proof of release or threat of release of a hazardous substance that caused the Agency to incur response costs
- Proof of liability of the responsible party
- Proof of expenditures.

To meet this burden, the Agency must meet the usual civil standard of proving all elements by preponderance of the evidence.

Regions should consider cost documentation an on-going process. Documents should be compiled and organized as the pertinent information becomes available.

File Content and Structure

The cost documentation file should contain the following documents:

- Case Resolution Document
- Cost Recovery Documentation Checklist
- Software Package for Unique Reports (SPURs)
- General Correspondence
- Cost Summary Report
- Payroll (HQ and Region)
- Agency Indirect Costs
- Travel (HQ and Regions)
- Contracts by Contractor
- Interagency Agreements by Agency (IAGs)
- State Cooperative Agreement or State Contract
- National Enforcement Investigation Center
- Environmental Photographic Interpretation Center
- Miscellaneous Procurement Expenses.

The Cost Recovery Coordinator, in coordination with the Regional Financial Management Office, coordinates the collection, assembly, and summarizing of Regional cost documents.

File Management Process

The Regional cost recovery staff fills out the cost recovery checklist and sends it to OWPE. That office then requests that the HQ Financial Management Division provide documentation supporting most contractor expenses and Headquarters payroll and travel costs. The documents are sent back to the Region, where staff compiles supporting documentation for all Regional costs including payroll and travel.

For more information on documenting costs and activities, see Chapter XII, Cost Recovery.

D. *Storage and Maintenance of the Records*

The Records Management Officer in the Information Management Section of the Region has the responsibility for maintaining and storing the site files and the Administrative Record files. In some Regions, there is an Administrative Records Coordinator who takes responsibility for those files. The responsibilities and those who handle them differ from Region to Region. There is currently an initiative through OWPE and the Office of Information Resources Management (OIRM) to establish records management systems for site files in all Regions. Evaluation of current Regional file management format for potential integration with Administrative Record needs should be considered.

File Maintenance

File maintenance includes a file maintenance plan, development of charge-out procedures, and documentation of file use. For guidance on file maintenance procedures and efficient filing procedures, refer to Chapter 7 of OIRM 2160, Records Management Manual (1986).

Disposition of Inactive Records

Superfund Records are designated as permanent records and are not subject to destruction. Inactive Records may be transferred to a Federal Records Center in accordance with EPA records control schedules. For general guidance on record disposition, refer to Chapter 3 of OIRM 2160, Records Management Manual (1986). Specific guidance on disposition of Superfund records is being developed by OWPE and OIRM.

Vital Records

Vital records are those records deemed crucial to EPA's operation. The vital records program is designed to protect EPA's vital records in case of disaster or emergency. OIRM in Headquarters has established a Superfund Document Management Workgroup to address, as one of its tasks, the issue of which Superfund documents fall into this category of vital records. For general guidance on policies and procedures, refer to Chapter 4 of OIRM 2160, Records Management Manual (1986).

III. PLANNING AND REPORTING REQUIREMENTS

A. *Setting Priorities*

Regions must set priorities for the order in which they plan to organize site files and compile Administrative Records. Regions should make a concentrated effort to implement the requirements of the proposed regulations with regard to removal and remedial Administrative Records compilation.

B. *Planning*

Records management plans for site files and Administrative Record files are Region-specific and depend on the state of the Region's record system and the methodology employed.

C. *Budget*

Funding for organizing site files is provided from a lump-sum records management budget managed by the Superfund enforcement support section. A standard budget for NPL site file organization ranges from $5,000 for a small site to $20,000 for a large, complex site. Most Regions will have sites which range in size and complexity and will have to balance their budgets accordingly.

Funding for Administrative Record compilation can be obtained through REM, TES, TAT, or 8(a) contracts. The standard budget for RI/FS (REM), removals (TAT), or PRP oversight (TES) is from $5,000 for a small site to $20,000 for a large and complex site.

IV. POTENTIAL PROBLEMS/RESOLUTIONS

A. *Space*

Lack of space for Administrative Record compilation, public access, and records storage are common records management problems in the Regions. Also, the large volume of site files can make it difficult to select and obtain documents for the Administrative Record due to lack of file organization. By organizing site files into a central data bank, Regions are able to establish an adequate base for compilation of the Administrative Record.

Due to lack of space, increased record retrieval requirements, tracking needs, and storage limitations, some Regions are moving toward electronic files and microfiche.

B. *Transporting the Record to the Site*

Some Regions have experienced difficulty in identifying locations for the record at or near the site, contacting the facilities, and transmitting the records to the site. Regions have found that working closely with their community relations coordinators can be helpful in identifying facilities, and, in some cases, transporting the records.

C. *ORC and RPM Involvement*

Regions have experienced difficulty in obtaining adequate and timely participation by the ORC and RPM/OSC in the Administrative Record due to their heavy workloads. Furthermore, the ORC and RPM/OSC perceptions may vary as to what they believe should be included in the Administrative Record file. Several Regions have found training to be helpful and that early joint involvement by the RPM/OSC and ORC in record compilation can facilitate the process.

V. REFERENCES

Policies

Proposed Revisions to National Oil and Hazardous Substances Contingency Plan, (December 21, 1988).

Guidance

OSWER Directive 9360.2-01, "Model Program for Removal Site File Management" (July 1988).

OSWER Directive 9833.3, "Interim Guidance on Administrative Records for Selection of CERCLA Response Actions" (March 1, 1989).

OSWER Directive 9836.0-1A, "Community Relations During Enforcement Activities and Development of the Administrative Record" (November 3, 1988).

OSWER Directive 9355.3-02, "Interim Final Guidance on Preparing Superfund Decision Documents" (July 1989).

OSWER Directive 9832.1, "Cost Recovery Actions Under CERCLA" (August 1983).

OSWER Directive 9355.0-7A, "Data Quality Objectives for Remedial Response Activities" (March 1987).

Manuals

OSWER Directive 9355.0-14, The Compendium of Superfund Field Operations Methods (December 1987).

OSWER Directive 9833.4, "Compendium of CERCLA Response Selection Guidance Documents" (May 1989).

OSWER Directive 9230.0-3B, Community Relations in Superfund: A Handbook (March 1988).

OSWER Directive 9240.0-01, The User's Guide to the Contract Laboratory Program (1986).

OSWER Directive 9832.0-1A, "Procedures for Documenting Costs in CERCLA § 107 Actions" (January 30, 1985).

Office of Information Management 2160, Records Management Manual (January 1986).

The National Enforcement Investigation Center Policies and Procedures Manual (1981).

Contact

OWPE, CERCLA Enforcement Division, Guidance and Oversight Branch FTS 475-9806.

OWPE, CERCLA Enforcement Division, Technical Support Branch, FTS 475-9871.

OIRM, Information Management and Services Division, FTS 475-6760.

451

Training OWPE has conducted Regional training workshops on the Administrative Record. In addition, the Office of Information Resources Management is developing three programs for CERCLA Records Management:

1) Model Site File Management Program
2) Superfund Records Management Certification Program
3) Evaluation of Superfund Records Management Initiative.

CASE BUDGET/CONTRACTS

I. **DESCRIPTION OF ACTIVITY** 1

Introduction 1

II. **PROCEDURES AND INTERACTIONS** 3

- A. Case Budget Process 3
  - Budget Development 3
  - Resource Allocation 3
  - Pricing Factors 3
  - Negotiating Changes 3
- B. Delegations of Responsibility 4
- C. Purpose and Scope of Contracts 4
- D. Work Assignment Manager Responsibilities 4
  - Pre-Issuance Period 4
  - Post-Issuance Period 5
    - Administrative Responsibilities 5
    - Technical Responsibilities 5
  - Work Assignment Close-out 6
  - Restrictions on the WAM 7

III. **PLANNING AND REPORTING REQUIREMENTS** 8

- A. Relationship to SCAP 8
- B. Obligating Documents 8
- C. Effective Dates 8
- D. Non-Site-Specific Funds 9
- E. Contractual Issues 9

IV. **POTENTIAL PROBLEMS/RESOLUTIONS** 10

- A. Estimating Costs 10
- B. Scope of Work (SOW) 10
- C. Conflicts of Interest 10
- D. Poor Quality Contractor Work 11

V. **REFERENCES** 12

Policies 12
Guidance 12
Manuals 12
Training 12
Contacts 12

CASE BUDGET/CONTRACTS

I. DESCRIPTION OF ACTIVITY

Introduction

This chapter discusses the procedures and mechanisms by which RPMs plan and use EPA's extramural resources for Superfund enforcement program support. These resources usually are referred to as the enforcement Case Budget. It is important to note that extramural resources for RD/RA oversight are managed separately by the Superfund remedial program through the Office of Emergency and Remedial Response (OERR) in Headquarters. The Case Budget includes the funds for most work performed by contractors, other Federal agencies under Inter-Agency Agreements (IAGs), and States under State Cooperative Agreements (CAs). This chapter describes how Case Budget funds are planned, allocated, and distributed, as well as the requirements an RPM must follow in obtaining and managing these resources. It is important for RPMs to understand the contract management process because the Superfund program relies on contractors for technical input and support. RPMs must be familiar with contract management procedures to ensure that the contractor and other extramural resources are used effectively. RPMs also must be familiar with the Case Budget planning process so that they can ensure the necessary funds are available when needed.

Extramural Case Budget resources support a wide variety of Regional and Headquarters enforcement activities. The process used for planning Case Budget expenditures is integrated with the SCAP, budget distribution, and Advice of Allowance (AOA) processes. Information on Regional Case Budget requests is stored in the CERCLA Information System (CERCLIS), which is used to allocate available extramural funds among the Regions and to track approved Case Budget tasking and obligations. In addition, OWPE has developed the Technical Enforcement Support Work Assignment Tracking System (TESWATS), which provides a method for tracking the status of each work assignment issued under the Technical Enforcement Support (TES) contracts.

The Case Budget as well as the response program planning process are closely linked to the SCAP target-setting process. The largest share of Case Budget funds is tied directly to the Regions' SCAP targets, based on estimates of the average level of resources required to support each activity. For some activities, such as RI/FS oversight, resources are allocated on a quarterly basis from the time the activity starts until it is completed. Therefore, resources may be available to support these activities in fiscal years when no SCAP-targeted activity will occur. In these cases funding is limited to a finite length of time for budget purposes. For example, RI/FS activities are normally limited to 10 quarters worth of funding, RDs to three quarters, RAs to 10 quarters, and cost recovery litigation to 12 quarters. Extramural funds are provided by the various program elements within EPA. Identification of the budget source during the Case Budget process enables each program to develop an annual extramural budget and facilitates the AOA process. There are six budget sources for extramural resources: Enforcement, Remedial, Removal, and Headquarters Enforcement, Headquarters Remedial, and Headquarters Removal. Use of these budget sources for support of any specific activity is dictated by one or more of the following: Congressional appropriations authority; Office of Management and Budget (OMB) directives; EPA Office of

Comptroller guidance; and Office of Solid Waste and Emergency Response (OSWER) administrative policy and guidance. Thus, oversight of PRP-conducted RD/RA activities is funded through the Regional Remedial extramural budget by OSWER administrative policy. Refer to Chapter XVII, SCAP/SPMS Cycle, for a more detailed description of the SCAP process.

Exhibit XVI-1 shows the iterative process that takes place between Headquarters and the Regions, whereby the Case Budget is determined according to Regional needs, national priorities, and funding constraints. Exhibit XVI-1 reflects both Regional and Headquarters responsibilities with respect to Case Budget planning and obligations.

CERCLIS is the system used by the Regions and Headquarters to communicate during the Case Budget process. The Regions are responsible for entering data on planned activity dates, funding requirements, and contract vehicles into CERCLIS during the SCAP target-setting negotiations. Headquarters uses that data, and the negotiated targets, to allocate the Region's Case Budget funds.

The primary contract vehicles for enforcement support are the TES contracts. The purpose of these contracts is to assist EPA in PRP oversight, community relations, case support, negotiations with responsible parties, and referrals to DOJ. The TES III and TES IV contracts expired in FY89. A new series of TES contracts, beginning with TES V, became available in FY89. The TES V and up (or TES V+) contracts will last for five years and will consist of two contractors available in each of four zones across the country. The coverage of these contracts is shown below:

Zone 1: Regions I and II

Zone 2: Regions III and IV

Zone 3: Regions V, VI, and VII

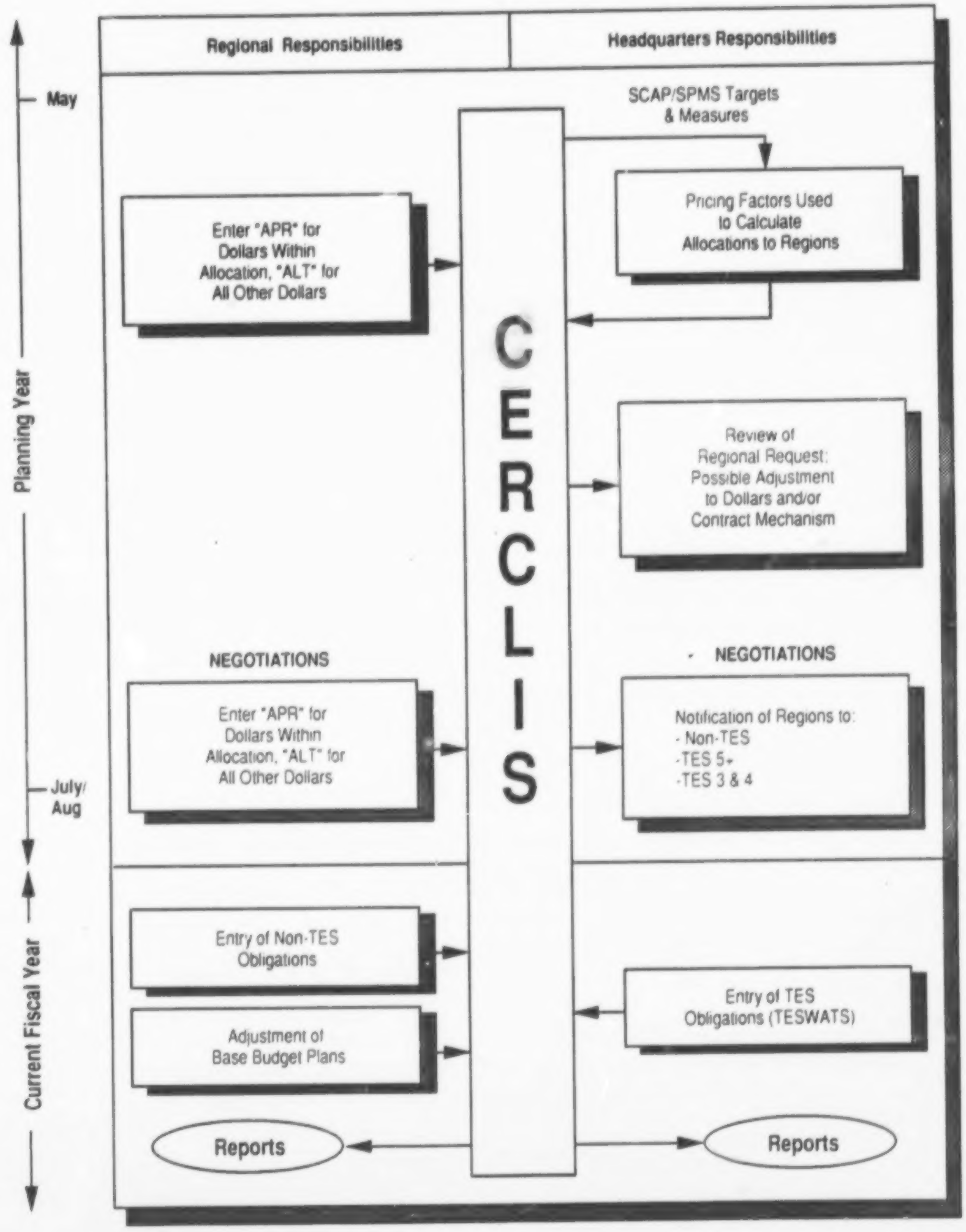
Zone 4: Regions VIII, IX, and X.

Additional contracts available for enforcement support include the Alternative Remedial Contracts Strategy (ARCS) contracts and 8(a) firms. Regardless of the contract vehicle that is used, RPMs generally act as Work Assignment Managers (WAMs) for specific projects that affect their sites. This role includes both administrative and technical responsibilities. WAMs must develop the scope of work for the project, review the work plan, track project progress, and close out the assignment upon its completion. They must also provide technical guidance to the contractor and ensure that the contractor's work meets the Agency's standards for quality.

455

Exhibit XVI-1

Case Budget Data Flow


Regional Responsibilities
Headquarters Responsibilities
May
Planning Year
July/ Aug
Current Fiscal Year
SCAP/SPMS Targets & Measures
Pricing Factors Used to Calculate Allocations to Regions
Enter "APR" for Dollars Within Allocation, "ALT" for All Other Dollars
CERCLIS
Review of Regional Request: Possible Adjustment to Dollars and/or Contract Mechanism
NEGOTIATIONS
NEGOTIATIONS
Enter "APR" for Dollars Within Allocation, "ALT" for All Other Dollars
Notification of Regions to:
- Non-TES
-TES 5+
-TES 3 & 4
Entry of Non-TES Obligations
Adjustment of Base Budget Plans
Entry of TES Obligations (TESWATS)
Reports
Reports

II. PROCEDURES AND INTERACTIONS

This section discusses the specific procedures that the Regions and Headquarters follow in implementing the Case Budget process and managing enforcement work assignments. It begins with a brief discussion of the budget development and allocation processes and focuses on the RPM's role in contract management.

A. *Case Budget Process*

The EPA budget process has two major components that are closely linked. The first, which is used to determine the total level of resources available to the Agency for the Superfund program, is the budget development process. The second component focuses on allocating the total available resources among the ten Regions.

Budget Development

The amount of extramural funds that are available to all ten Regions is determined by the Federal government's budget development process. This process involves a planning cycle in which each agency, including EPA, submits its estimated resource needs to Congress at the beginning of each calendar year. Congress then reviews these requests and, shortly before the beginning of the fiscal year, determines the appropriate level for each agency. The budget becomes effective once the President signs the appropriations bill.

Resource Allocation

Once the total level of available resources has been determined, those funds are allocated to the Regions based on Regional need as well as other Regional and Headquarters program priorities. Case Budget funds are formally distributed to the Regions through the AOA process. AOA distributions are based primarily on average pricing factors and the targets and measures for SCAP activities, as listed in CERCLIS. Additional funds are provided for enforcement activities that the Region anticipates, but that are not themselves SCAP targets or measures, such as Administrative Record compilation and program management needs. The targets and measures are developed through an iterative process between Headquarters and the Regions, based on workload model activities, personnel allocations for each activity, the availability of funds, the priority of the sites needing support, and Congressional and Agency priorities. Resources are allocated from the Headquarters and Regional offices of the removal, remedial, and enforcement programs, each of which has a separate AOA.

Pricing Factors

Headquarters and Regional program managers have developed pricing factors for each enforcement activity. These pricing factors are estimates of the average extramural cost of each major activity and are intended to guide the Regions in estimating their resource needs for upcoming fiscal years. These factors are reviewed annually in the SCAP and budget development process. Adjustments to these factors, as applied to individual sites, may be made during SCAP negotiations based on site peculiarities, and the Regions' histories of changing targets and measures over the course of the fiscal year. The current year's pricing factors can be found in the OSWER SCAP Manual.

Negotiating Changes

If, during the course of a fiscal year, a Region identifies a significant change in the resources that will be required to support its enforcement activities, it can negotiate to change its Case Budget allocation. While there are rarely any additional funds available on a nationwide basis, shifts between Regions are negotiated among the Regions and

Headquarters on a semi-annual basis. Each Region has an opportunity to present its needs and Headquarters decides which AOAs to change based upon national priorities, performance, and any unanticipated site problems or activities.

B. Delegations of Responsibility

Beginning in FY89, the Regions will play a significant role in both the financial and contractual management of the enforcement program. In the area of financial management, the Regions are responsible for obligating all funds except those used for TES III and TES IV. (TES III and TES IV funds are not distributed to the Regions in AOAs but are held at Headquarters to fund approved Regional and Headquarters work assignments.) This includes mechanisms such as TES V+, State Cooperative Agreements (CAs), ARCS, 8(a) contracts, small purchases, and site-specific contracts. The Regions are also responsible for ensuring that the total funds obligated do not exceed the Region's AOA for non-TES and TES V+ funds. Additional information on financial management is available in the OSWER SCAP Manual.

Contractually, the Regions are responsible for reviewing and recommending payment of each invoice and voucher submitted under contracts and other vehicles for which they have financial management responsibilities. For all TES contracts, Project Officer approval authority for work assignments has been delegated to the Regional Project Officers. Under this delegation, the Regions are responsible for WA initiation and tracking, performance evaluation, and WA closeout where necessary. In addition, the Regions must ensure that the necessary SCAP information is complete and available to track each transaction in TESWATS and CERCLIS.

C. Purpose and Scope of Contracts

EPA has contracts with TES contractors to assist the Agency in carrying out its enforcement activities. The TES contracts are level-of-effort (LOE) contracts and, as such, allow specific tasks to be assigned to the contractors on an as-needed basis, within the restrictions of the overall contract statement of work. Hours are assigned to a project based upon EPA's estimate of the level of effort required to complete the project. In addition, the Regions have access to other contract vehicles that may be used to support Enforcement activities. These include: ARCS, 8(a) contracts, small purchases, and site-specific contracts. Each of these is discussed in Exhibit XVI-2. IAGs also may be used to support Regional enforcement activities. OWPE currently has IAGs with DOJ, the U.S. Army Corps of Engineers, the U.S. Geological Survey, and the U.S. Fish and Wildlife Service. A detailed discussion of the use of State Cooperative Agreements can be found in Chapter XIV, State Enforcement

D. Work Assignment Manager Responsibilities

In many instances, the RPM will act as the Work Assignment Manager (WAM) on work assignments at sites that are his/her responsibility. This section describes the administrative and technical responsibilities of the EPA WAM prior to issuance of a work assignment under an EPA contract and throughout the period of performance of the project.

Pre-Issuance Period

Before the work assignment is issued, the WAM is responsible for defining and preparing the Scope of Work (SOW), and ensuring that the approach to accomplishing the project is within the contract's statement of work. This includes a review of the potential

Exhibit XVI-2

EPA Contract Vehicles

Contract Vehicle	Description	Contract Type	Managing Office
Technical Enforcement Support (TES)	Broad range of Enforcement services including: • investigative skills for responsible party searches • engineering skills for feasibility studies and PRP oversight • systems expertise for document indexing and organization • financial support for assistance in negotiations.	Cost plus award fee, level of effort, individual work assignments.	OWPE and Regional Project Officers
Alternative Remedial Contracts Strategy (ARCS)	Broad range of Remedial services including: • Remedial Action oversight • RI/FS and RD/RA at Fund-lead sites • Community Relations.	Cost plus award fee, level of effort, individual work assignments.	OERR and Regional Project Officers
Section 8(a)	Can be used for any services for which contractor qualifies, have been used for: • PRP Searches • Records Management support • Emergency Response.	Type varies, must be issued to firms 51%-owned by minority or disadvantaged.	Regional Project Officers
Small Purchases	Broad range of services, goods, or materials. Price limits of $10,000 (with no public notice) and $25,000 (with notice in Federal Register) apply.	Generally fixed price.	Regional Project Officers
Site-Specific Contracts	Situations where specific services or materials are needed for a particular site. Generally used for removals.	Typically time and materials.	Regional Project Officers

contractor's staffing to see that the level of personnel is sufficient to perform the work and a determination of the adequacy and reasonableness of the level and allocation of resources for various tasks under the WA.

Additionally, the WAM is responsible for identifying the applicable appropriation for the WA, the period of performance, project schedule and milestones, travel requirements, and any government property or equipment needed to successfully complete the assignment. Once the WAM has assembled this information, the WA should be discussed with the Section Chief for a determination of the project's priority.

Post-Issuance Period

The WAM's post-issuance responsibilities can be divided into two broad categories: administrative and technical. Both are critical to the effective use of EPA's contractor resources.

Administrative Responsibilities

The WAM's administrative responsibilities begin with the review and approval of both the cost and technical aspects of the contractor's work plan. In addition, the WAM has monthly responsibilities that include reviewing and approving or disapproving contractor vouchers, and reviewing progress reports to identify any potential problems. If problems are identified, the WAM should contact the Regional Project Officer (RPO) and discuss possible solutions. Additional post-issuance responsibilities include: providing any information on WA status required by contract managers; preparing technical direction memoranda and changes to level of effort; and assisting in the closeout of the work assignment once all work is completed. In addition, an important administrative responsibility of the WAM is to provide periodic information on the contractor's performance to be used in the performance evaluation process that determines the contractor's award fee. The WAM is required to prepare a Performance Evaluation Report (PER) on a periodic basis (usually a trimester) defined by the Performance Evaluation Board for the TES contract being used. The WAM may be asked to assist in developing performance evaluation summary reports for the RPO.

Technical Responsibilities

In addition to the WAM's administrative responsibilities, he/she acts as the principal technical contact between the Agency and the contractor. In this role the WAM must ensure that the contractor has any necessary guidance and policy materials to ensure proper completion of the project, monitor and oversee all contractor work to verify that required quality standards are met, provide technical direction where necessary, and review and approve or reject all project deliverables. The WAM is ultimately responsible for the quality of the contractor's work.

The WAM's technical management of the WA is critical to the success of the project. On major projects, the WAM should meet regularly with the contractor to monitor progress on the work assignment. These meetings may be weekly, monthly, or bi-monthly, depending on the level of activity on the assignment. At these meetings, the WAM should request a status report that describes the progress made since the previous meeting, any problems that have been encountered, any changes in approach that are anticipated by the contractor, and the next activity that the contractor expects to perform. In addition to regular meetings, the WAM should review drafts of major deliverables to ensure that the project is moving in the right direction. Where on-site work is involved, the WAM should go with the contractor to the site on a periodic basis to monitor the work that is performed.

In addition to these general management responsibilities, the following are examples of the types of WAM involvement that may be required for two different types of enforcement assignments.

PRP Search:

- Identify existing materials that may contain relevant information on PRP identities
- Arrange access to information in EPA and State files
- Provide the contractor with information about the technical conditions at the site
- Review the draft PRP Search Report to identify any additional data that may be missing
- Ensure proper management review of the PRP Search Report
- Work with the contractor to identify additional tasks that will be needed to fill gaps in the data
- Review drafts of the interim final report to ensure completeness and accuracy.

RI/FS Oversight:

- Provide the contractor with complete records of the technical conditions at the site
- Provide the contractor with all settlement agreements and PRP work schedules
- Work with the contractor to determine the necessary level of on-site presence during sampling events
- Review the contractor's analysis of the PRP's technical performance.

Work Assignment Close-out

Upon completion of the work assignment, the contractor will submit a final report summarizing the total costs for the project and a summary of the work that was done. The WAM is responsible for verifying that the WA has been completed fully and satisfactorily. If budgeted, a meeting may be held between the WAM and the contractor to review the project's performance and completion.

Restrictions on the WAM

During the course of directing a work assignment, the EPA WAM shall not:

- Make changes or issue orders that will affect the terms and conditions of the contract (only the Contract Officer has such authority)
- Give technical direction that will increase costs and level of effort or change the technical approach of the project
- Authorize services or work to begin before issuance of the work assignment
- Direct or request the contractor to perform services that create an employee/employer conflict
- Create a conflict of interest situation
- Direct the placement of a subcontract.

The WAM may:

- Oversee the progress of the contract
- Issue technical direction which is consistent with the statement of work and does not require an increase in estimated cost or fee or a time extension
- Amend the work assignment if there is an increase or decrease in the level of effort, a significant change in the budget, or modifications to the scope of work. Work assignment amendments must be approved by the Project Officer and the Contract Officer before the changes take effect.

In summary, the WAM should not direct the contractor to do anything that might bind the government to pay for additional goods or services not anticipated in the current work plan for the WA.

III. PLANNING AND REPORTING REQUIREMENTS

The CERCLIS database has been designed to accommodate data describing site-specific and non-site-specific planned and actual obligations. It is the primary mechanism for tracking the planning and utilization of Case Budget funds. Although the Integrated Financial Management System (IFMS) is the official Agency system for tracking obligations, commitment, and expenditures of Agency funds, these data are periodically down-loaded into CERCLIS from IFMS. Within CERCLIS, the site-specific planned obligations will be entered directly into the appropriate Event or Enforcement Activity record for the site. Non-site-specific planned obligations are entered by the Regions into CERHELP, the non-site-specific portion of CERCLIS.

TESWATS, the TES Work Assignment Tracking System, is intended to facilitate management of the large volume of work assignments under the TES contracts. This system, maintained by both Headquarters and Regional staff, contains information about the financial status of each active TES WA. Regional staff are responsible for entering the date the WA is initiated and the project budget. Headquarters staff enters data concerning when a work assignment is approved by the contracting officer. Other major dates, such as WA amendments, are entered by the Region. The RPM should be aware that the information on the work assignment forms, used to initiate and amend TES work assignments, is also used to enter this data into TESWATS.

A. Relationship to SCAP

As discussed previously, the Case Budget planning process is directly related to the SCAP target-setting negotiations that take place in February and August of each fiscal year. RPMs must actively participate in that process to ensure that sufficient funds are available to support each planned and ongoing enforcement action. The SCAP process is described in detail in Chapter XVII, SCAP/SPMS Cycle.

In addition to participating in the SCAP process, the Regions are responsible for entering key data on extramural obligations into CERCLIS for all actions except TES III, TES IV, and TES V+. These obligations should be entered by the 7th of the first month of each fiscal quarter. The Regions are responsible for verifying the information in IFMS and CERCLIS for the transactions they obligate or deobligate and the outlays they incur. Headquarters will enter TES III, TES IV, and TES V+ obligations into CERCLIS based on the data in TESWATS.

B. Obligating Documents

To assist in the allocation and tracking process, the following information must appear on all Regionally-prepared obligating documents: EPA ID number, site spill ID number, operable unit number, CERCLIS Event or Activity code, work assignment number, and dollars obligated. For TES work assignments, the TESWATS system is unable to accomodate, and the contracting officer is therefore unable to approve, requests that do not include this information. In addition, the proper account numbers must be determined for each transaction before the commitment or obligation is made.

C. Effective Dates

A Cooperative Agreement is considered obligated when it is signed by the Regional Administrator; an IAG is considered obligated when it is signed by the other agency; contracts are considered obligated when the Contract Officer signs the obligating

4113

document (e.g., for TES, the obligating document is the work assignment, for 8(a) firms, the obligating document is the contract).

D. Non-Site-Specific Funds

Non-site-specific plans should indicate total dollars requested for an activity that the Region is unable or does not wish to indicate site-specifically. Non-site-specific records should also indicate the number of sites at which an activity is expected to occur, as well as the contract mechanism. Headquarters requires this information for the Regional Case Budget allocation.

E. Contractual Issues

Preparation of a funding document is the primary step in the process of committing and obligating funds made available through the Superfund program's AOA. The funding document specifies the commitment date, the amount, and the funding vehicles, including contracts, Cooperative Agreements, and IAGs. The Integrated Financial Management System establishes the official obligation date and other pertinent data when the transaction is entered into IFMS. These documents must be used whenever Superfund AOA funds will be used.

The SCAP Manual is the definitive statement of policy and procedures on the handling of SCAP-related information. Therefore, RPMs should refer to the most recent version of that manual for current information on financial reporting requirements.

IV. POTENTIAL PROBLEMS/RESOLUTIONS

This section presents some of the problems that may be encountered by an RPM participating in the Case Budget process or managing enforcement contracts.

A. Estimating Costs

Due to environmental differences throughout the Regions, costs and LOE estimates for similar projects, such as RI/FS oversight, may vary dramatically. Therefore, it is important to make estimates based on the activities to be completed in the particular Region, and not on national averages. RPMs should consult with others who have done similar work under similar conditions to more accurately estimate the likely costs of any given project. However, because resources are allocated based on average pricing factors, if one project in a Region will cost more than the average, the Region should be prepared to identify another project that will require fewer resources than allocated in the average pricing factor.

From a national planning perspective, the issue of keeping pricing factors comparable with "real world" costs has always been an area of concern for the Federal government. Therefore, it is imperative that those who contribute to the pricing factor development process be kept abreast of the latest estimates of site clean-up activity costs.

B. Scope of Work (SOW)

When the RPM develops a SOW for a work assignment, it is important to clearly define the process and products that are required. The SOW will act as the contractor's guide to performing the assignment, and the more direction that is provided, the better the final product will be. Where unusual site conditions or the unavailability of critical data will affect the project approach, the RPM should clearly identify these problems in the SOW and allow for alternative approaches.

To the extent possible, the SOW should set forth a detailed approach to the project and should include an outline of the deliverables that are expected. In addition, a time schedule for the deliverables should be presented that includes periods for RPM review of draft deliverables and that reasonably reflects the time constraints on the RPM. The SOW should also identify any applicable guidance, such as the PRP Search Manual, that may assist the contractor in performing the assignment.

C. Conflicts of Interest

There are two areas in which conflicts of interest may be raised as an issue of concern to the WAM. The first is the WAM's personal conduct. The second area of concern is the contractor's commercial or business activities with clients other than the government that could pose problems with performance of the work assignment.

In regard to personal conduct, the WAM must be familiar with the U.S. EPA Guidance on Ethics and Conflicts of Interest document of February 1984 as well as similar provisions outlined in Chapter 5 of the U.S. EPA Project Officers' Handbook, Second Edition, dated April 1984. Based on this information, the WAM must avoid any actual, apparent, or potential conflict in the work assignment and the contract. The WAM will not participate knowingly in the contract where a conflict of interest could arise and will immediately report to the Project Officer any circumstance that could raise this issue. Basically, a conflict of interest arises when the WAM has financial or personal interest in the regulated community.

The contractors have established a formal procedure to identify and resolve any potential, apparent, or actual conflict of interest. The conflict issue may arise whenever the contractor has a client other than the U.S. EPA. EPA's concern is to protect the contractor's integrity for supporting EPA's enforcement mission. The WAM may be called upon for information whenever there is awareness of a commercial activity of the contractor that could be in conflict with the work assignment. Any knowledge of such a commercial activity must be reported to the project officer immediately. This second type of conflict is particularly important in the enforcement area, because TES contractors may need to testify in court if EPA decides to sue the PRPs.

D. Poor Quality Contractor Work

WAMs are responsible for ensuring that contractors maintain a high standard of quality on their work. To assist in this, the WAM needs to outline specifically in the SOW what services are to be provided, the time frames involved, and the reporting requirements. Also, strict Quality Assurance/Quality Control (QA/QC) procedures should be applied to each phase of a work assignment, rather than at the end of the assignment only. However, if poor-quality work is consistently delivered by a particular contractor to the Agency after these measures have been taken, the most effective way to eliminate this problem is to issue a stop-work-order, after consultation with the Project Officer and Regional management. Stop-work-orders can only be issued by the Contract Officer. Poor contractor performance can be addressed by scheduling meetings with the contractor to state the Agency's concerns in this respect, and if necessary, elevating the issue to the contractor's and Agency's upper management. Another avenue available to improve contractor performance is to note poor performance in a performance evaluation report which is then reviewed by the Performance Evaluation Board. Poor performance can thus be reflected in the award fee provided to the contractor during this periodic review.

Extensions of a period of performance and expansions of a work assignment budget should be accomplished only through an approved work assignment amendment. Verbal instructions to the contractor, in this regard, by the RPO, or WAM are never acceptable. By providing verbal instructions, a WAM could so mislead a contractor that the government would be bound to pay the contractor's costs for services rendered on a theory of quasi-contract. A quasi-contract is not a contract, but a theory that the government should pay for rendered services. Case law indicates that the government could hold an employee liable for costs in such a situation. This position has never been tested in relation to an EPA employee.

V. REFERENCES

Policies	Office of Administration, Grants Administration Division, "The Interagency Agreements Policy and Procedures Compendium" (1988).
Guidance	"U.S. EPA Guidance on Ethics and Conflicts of Interest" (February 1984).
Manuals	OSWER Directive 9871.0, "Roles and Responsibilities of Regional Project Officers and Work Assignment Managers Under the Technical Enforcement Support (TES) Contracts" (March 3, 1989). OSWER Directive 9200.3-01, SCAP Manual (updated annually). U.S. EPA Project Officer's Handbook, Second Edition (April 1984).
Training	Required training course for all POs, WAMs, and/or DOOs, "Contract Administration Training for Project Officers, Work Assignment Managers, and Delivery Order Officers," is offered in all Regions by the EPA Institute. Training is also available from OWPE, CERCLA Enforcement Division, Technical Support Branch in the use of the TESWATS system. This office, as well as Regional Project Officers, can provide guidance on preparing work assignments, performance evaluation reviews, cost verification forms, etc.
Contacts	Office of Waste Programs Enforcement, CERCLA Enforcement Division, Technical Support Branch, Contracts Management Section. FTS 382-5611.

SCAP/SPMS CYCLE

I. **DESCRIPTION OF ACTIVITY** 1

Introduction 1
SCAP 1
Budget 2
FTEs 2
SPMS 2
SCAP/SPMS Relationship 2
CERCLIS 2
  CERCLIS Database 3
  CERHELP Database 3

II. **PROCEDURES AND INTERACTIONS** 4

A. The SCAP Process 4
B. The IMC 4
C. Targets/Measures 4
D. Development of Reporting Measures 4
E Target Setting 5

III. **PLANNING AND REPORTING REQUIREMENTS** 6

A. SCAP Planning 6
B. Semi-Annual Planning Process 6
C. SCAP/SPMS Adjustment/Amendments 6
D. SPMS Target Adjustments 7
E Planning Requirements and Procedures 7
F. Accomplishment Reporting 8
G. SPMS 8
H. SCAP 8
I Financial Planning and Management 8
J. Case Budget 9
K. Advice of Allowance 9
  AOA Process 9
  AOA Change Request Procedures 10

IV. **POTENTIAL PROBLEMS/RESOLUTIONS** 11

A. Data Quality and Planning in CERCLIS 11
B. Headquarters/Regional Negotiations 11
C. Interpretation of Definitions 11
D. Impact of Schedule Changes on SCAP 11

V. **REFERENCES** 12

Manual 12
Contacts 12
Training 12

SCAP/SPMS CYCLE

I. DESCRIPTION OF ACTIVITY

Introduction

This chapter provides an overview of the Superfund Comprehensive Accomplishments Plan (SCAP) process and its relationship to the Agency-wide Strategic Planning and Management System (SPMS). More specific information on the process can be obtained from the SCAP Manual which is updated annually. RPMs play an important role in providing timely and accurate site information for entry into the Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS)--the database from which SCAP and SPMS reports are generated. SCAP and SPMS reports help plan, budget, track and evaluate Superfund program progress. The schedules and time frames presented in this chapter are for fiscal year 1990 and are subject to change. Information Management Coordinators (IMCs) will be informed of any changes that occur.

The SCAP process is used by the Superfund program to plan, budget, track and evaluate progress toward Superfund site cleanups. The SCAP process generates data that fulfills the following functions:

- Tracking of accomplishments
- Updating planning (schedules and funds) for the current fiscal year
- Providing planning data for outyear (e.g., the year after the planned fiscal year) budget purposes
- Responding to information requests from various sources including Congress and the Office of Management and Budget (OMB).

The SCAP planning process is a dynamic effort that has a significant impact on Superfund resource allocations and program evaluation. Planned obligations for the response budget and case budget, and SPMS targets and measures are generated through SCAP. CERCLIS data is the main source of information for the Superfund budget and evaluation process. The SCAP process is managed at Headquarters by the Office of Waste Programs Enforcement (OWPE) and the Office of Emergency and Remedial Response (OERR). SPMS is managed by the Office of Management Systems and Evaluation (OMSE).

SCAP

The SCAP process is crucial to Superfund program planning, tracking, and evaluation. SCAP tracks progress at each site and allows Regions and Headquarters to forecast site and program directions. The Agency Operating Guidance identifies Superfund priorities for the upcoming year, and SCAP targets and measures are designed to reflect these goals. In some cases, new SCAP categories are developed; in other cases, the projections for SCAP activities are adjusted to match the Agency's goals.

SCAP information is a subset of the site data collected through the CERCLIS system. The CERCLIS system consists of two databases, CERCLIS and CERHELP, which are discussed on the following pages.

Budget

A large part of the Superfund program's budget is based on the SCAP. A fiscal year's budget is developed approximately 18 months prior to the fiscal year being planned. For example, the SCAP existing in CERCLIS at the start of the third quarter of FY 89 will be used to formulate the FY 91 budget. The site schedules reflected in the SCAP as of May 10 serve as the foundation for determining outyear budget priorities, such as the dollar levels to be requested in the budget and the total level of full-time equivalents (FTEs) to be made available for distribution through the workload model.

FTEs

SCAP plans form the basis of the Superfund workload models that distribute FTEs for each program and Region. There are two Superfund program models, the Site and Spill Response model, which distributes resources for the remedial and removal programs, and the Technical Enforcement model, which distributes enforcement FTEs. The preliminary and final distributions of Regional and program resources for the upcoming fiscal year are based on the planning information contained in CERCLIS in the middle of March and the end of August, respectively.

SPMS

SPMS is an Agency-wide system used by EPA to set targets for, and monitor the key environmental objectives identified in the Agency's Operating Guidance for each fiscal year. National and Regional SPMS goals for Superfund are established and tracked through SCAP. SPMS targets and measures are reported quarterly by Headquarters and the Regions through CERCLIS to OMSE. OMSE tracks Regional progress toward SPMS goals on a quarterly basis as part of the overall Agency performance evaluation process.

SCAP/SPMS Relationship

SPMS targets and measures are a subset of those contained in SCAP, and SPMS accomplishments are generated through SCAP in CERCLIS. SCAP and SPMS planning and reporting cycles are set independently of each other. The SPMS reporting cycle is a quarterly cycle, whereas the SCAP reporting cycle is monthly. Negotiation of SCAP and SPMS targets and measures are semi-annual. At Headquarters, OWPE and OERR coordinate SCAP, and OMSE coordinates SPMS.

CERCLIS

The CERCLIS system consists of two databases: one site-specific database, CERCLIS, and a second non-site-specific database, CERHELP.

SCAP information is a subset of the site data collected through the CERCLIS system, thus CERCLIS tracks the SCAP. Data entry responsibilities and report retrieval abilities are at the Regional level so that Regional managers and users play a central role in maintaining and using the database. Headquarters relies on the CERCLIS system as the sole repository of information on plans and accomplishments.

CERCLIS Database

CERCLIS is a database that is used by Headquarters and Regional personnel for Superfund site, program, and project management. CERCLIS contains the official inventory of Superfund sites and supports site planning and tracking functions. Planning encompasses estimating project schedules as well as projecting financial requirements, which are part of the SCAP. In CERCLIS, financial data are integrated with data from the pre-remedial, remedial, removal, and enforcement programs. Through CERCLIS, Regions and Headquarters can see integrated financial and scheduling data for the pre-remedial, removal, remedial, and enforcement programs. The CERCLIS database contains site, Operable Unit (OU), enforcement activity, technical, and financial information. Each week, financial data from the Agency-wide Integrated Financial Management System (IFMS) are transferred into CERCLIS. The data transferred include such information as commitments, decommitments, obligations, deobligations, outlays, credits, transaction dates, obligating document numbers, and funding vehicles.

CERHELP Database

CERHELP contains non-site-specific information such as SCAP and SPMS targets, accomplishments, Advice of Allowance (AOA), budget, and other information on non-site-specific activity. The CERHELP database consists of the following separate files:

- The Targets and Accomplishments data file is used for setting and tracking SCAP and SPMS targets and measures. Preliminary and final Regional SCAP/SPMS commitments are entered into the system by the Headquarters SCAP Coordinator. Target and non-site-specific accomplishment data are updated to reflect SCAP adjustments or approved amendments as they occur. Regional reporting of non-site-specific accomplishments is also performed through this system. Data from this system are used in all "official" SCAP targets and accomplishment reports and are the baseline for Regional evaluation.

- The AOA file is used by Headquarters for SCAP budget development and control and for tracking and reporting the AOA process.

- Planning and tracking of non-site incident activities and financial data are accomplished through the Non-Site/Incident Activity system. Regions are responsible for entering and maintaining SCAP non-site-specific information.

CERHELP gives Regions access to non-site-specific budget information. Regions also will be able to track planning data and reconcile the site-specific planning in the CERCLIS database with the AOA and SCAP/SPMS targets in CERHELP. It serves as an important management tool for Regions and Headquarters.

II. PROCEDURES AND INTERACTIONS

A. *The SCAP Process*

The negotiation cycle is the mechanism by which quarterly and annual targets are established. The SCAP formal negotiating cycle occurs on a semi-annual basis. The negotiation cycle is discussed later in this chapter under Section III, Planning and Reporting Requirements.

B. *The IMC*

The Regional Information Management Coordinator (IMC) is a senior position that coordinates all Regional CERCLIS users and serves as the liaison between the Waste Management Division and the Environmental Services Division. The IMC also serves as the liaison between Headquarters and the Regions. The IMC holds ultimate responsibility for the data in CERCLIS and CERHELP. RPMs must coordinate fully with the IMC to ensure that accurate and timely information is entered into CERCLIS and that the most recent information is included in the SCAP target-setting and budgeting process.

C. *Targets/ Measures*

SCAP and SPMS targets are the key devices by which program goals are translated into quantifiable program achievements. They identify performance expectations for the Regions. Specific targets are negotiated with the Regions, and Regions commit themselves to achieving these goals. SCAP and SPMS targets therefore play a central role in ensuring that program goals are not seen only as a method for allocating resources.

A SCAP or SPMS targeted measure (either quarterly or annual) is a pre-determined numerical goal that is established prior to the fiscal year the designated activities will take place. Targeted measures are designed to reflect major steps in the cleanup or enforcement processes. Examples of SCAP and SPMS targeted activities are first RI/FS starts and section 107 remedial cost recovery referrals. Targeted measures quantify program achievement goals on a Region-specific, and in some cases, site-specific basis. Regions are evaluated according to their completion of targeted activities.

A SCAP or SPMS reporting measure, on the other hand, is not used for program accounting purposes. It is used to track an activity that is important in monitoring overall program progress. Reporting measures have no associated quantitative goals; only actual accomplishments are tracked. The SCAP process also uses projection measures. Projection measures result in numerical goals being established prior to the fiscal year. Projection measures represent each Region's estimate of what the Region will accomplish during a certain reporting period. Projection measures play a key role in setting annual budgets and FTE allocations.

Exhibits XVII-1 and XVII-2 set forth the SCAP and SPMS targets and measures for Fiscal Year 1990.

D. *Development of Reporting Measures*

Headquarters program offices take the lead in developing SPMS measures in conjunction with the development of the annual Agency Operating Guidance. Headquarters proposes reporting measures for OSWER before the beginning of the operating year. Regional responses to the proposed measures are returned to Headquarters in February and

Exhibit XVII-1(1)

FY 90 SCAP/SPMS Targets

ACTIVITIES	SPMS TARGET	SCAP TARGET	QUARTERLY TARGET	ANNUAL TARGET
Remedial				
Remedial Investigation/Feasibility Study Start				
First RI/FS Starts		X	X	X
Subsequent RI/FS Starts		X	X	X
RI/FS To Public		X	X	X
RI/FS Completions (ROD) (S/C-3)	X *		X	X
First RI/FS Completions (ROD)		X	X	X
Subsequent RI/FS Completion (ROD)		X	X	X
Final RI/FS Completion (ROD)		X	X	X
Remedial Design (RD) (S/C-4)	X *		X	X
First RD Start		X	X	X
Subsequent RD Starts		X	X	X
Final RD Start		X	X	X
Remedial Action (RA) Start (S/C-5)	X *		X	X
First RA Start - RP		X	X	X
First RA Start - Fund		X	X	X
Subsequent RA Start-RP		X	X	X
Subsequent RA Start - Fund		X	X	X
Final RA Start - RP		X	X	X
Final RA Start - Fund		X	X	X
NPL Sites with RA Starts Post-SARA		X	X	X
Final RA Completions		X	X	X
Deletion Initiated		X	X	X
Removal				
NPL Removal Start		X		X
Non-NPL Removal Start		X		X
NPL Site Completions through Removal Actions		X	X	
Remedial/Removal				
NPL Sites Addressed through removal action or RI/FS start (S/C-2)	X		X	X
NPL Sites where all remedial/removal implementation has been completed (S/C-6)	X		X	X

* The SPMS target combines first, subsequent and final as a single target.

Exhibit XVII-1(2)

FY 90 SCAP/SPMS Targets

ACTIVITIES	SPMS TARGET	SCAP TARGET	QUARTERLY TARGET	ANNUAL TARGET
Enforcement				
Start of RD/RA Negotiations		X	X	X
Conclusion of RD/RA Negotiations		X	X	X
Small Case Cost Recovery Referrals		X	X	X
Administrative Settlements		X	X	X
Section 106 RD/RA Referrals/Orders (S/E-4)				
- with settlement	X	X	X	X
- without settlement	X	X	X	X
- Unilateral Orders	X	X	X	X
Section 107 Cost Recovery Referral Actions and Settlements (>$200,000) (S/E-2)				
- Pre-RA	X	X	X	X
- Remedial Action and other pre-RA Events	X	X	X	X
Federal Facility				
NPL Sites with Federal Facility Agreements/ Interagency Agreements (S/E-5)	X	X	X	X
RI/FS Start		X	X	X
RI/FS Completions (ROD)	X	X	X	X
RD Start		X	X	X
Remedial Action Start	X	X	X	X
First RA Start		X	X	X
Subsequent RA Start		X	X	X
Final RA Start		X	X	X

Exhibit XVII-2

FY 90 SCAP/SPMS Measures

ACTIVITIES	SPMS REPORTING	SCAP PLAN/REPORT	QTRLY	ANNUAL
Remedial/Removal				
Percent of NPL Sites Addressed to date (S/C 2a)	X		X	X
Remedial				
RD Completions		X	X	X
RA Completions		X	X	X
RA On-Site Construction		X	X	X
Treatability Studies		X	X	
Removal Completions				
Removal Investigations Completed at NPL Sites		X		X
Removal Completions		X		X
Federal Facilities				
NPL Sites with RA Start Post - SARA		X	X	X
Enforcement				
NPL PRP Search Start		X	X	X
Non-NPL PRP Search Start		X	X	X
NPL Sites with Completed PRP Searches		X	X	X
Non-NPL Sites with Completed PRP Searches		X	X	X
Issuance of General Notice Letters		X	X	X
Issuance of Special Notice Letters		X	X	X
Removal Negotiations Starts		X	X	X
Removal Negotiations Complete		X	X	X
Administrative Orders for Removals (S/E-1)	X	X	X	X
RI/FS Negotiations Start		X	X	X
RI/FS Negotiations Complete		X	X	X
Section 106/107 Referrals with or w/o Settlement (>$200,000) (S/E-2)				
- Pre-RA	X	X	X	X
- Remedial Action and other pre-RA Events	X	X	X	X
Section 106, 106/107 Case Resolution		X	X	X
Section 107 Case Resolution		X	X	X
Dollars Achieved thru Cost Recovery (S/E-3)	X		X	X
104(e) Letters Issued		X	X	X
104(e) Referrals		X	X	X
Demand Letters Issued		X	X	X
Cost Recovery Close-out Memo		X	X	X
Administrative Record Compilation Completed (Removal and Remedial)		X	X	X
Compliance Enforcement		X	X	X

March, as part of the annual Agency Operating Guidance development process. Measures normally are finalized in August prior to the beginning of the fiscal year.

E Target Setting

The process for the development of a fiscal year's SCAP and SPMS targets and measures begins during the second quarter of the previous fiscal year. Preliminary targets and measures for the upcoming fiscal year are set by mid-March and are used to derive the preliminary FTE allocations for the coming year. All SCAP targets and measures are negotiated, and numbers are established only after discussions have been held between OERR, OWPE and the Regions. Final SCAP and SPMS targets are set in the fourth quarter SCAP, which is finalized in August. Final targets and measures also involve Headquarters/Regional negotiations. The SCAP Manual contains detailed procedures for target setting.

SCAP and SPMS Targets and Projection Measures are negotiated as SCAP targets. Therefore, SPMS targets are also SCAP targets.

Several CERCLIS reports are used by Headquarters and the Regions in the development and negotiation of Regional outputs. RPMs should check with their IMC to obtain these reports.

III. PLANNING AND REPORTING REQUIREMENTS

A. SCAP Planning

Regions are required to keep the SCAP data in CERCLIS and CERHELP up-to-date and accurate. Changes in planning information (i.e., schedules and funds) should be entered into CERCLIS or CERHELP within five days of the RPM becoming aware of the need for the change. Accomplishments are also to be reported within five days. RPMs should contact the IMC through their Section Chief as soon as possible regarding changes in site information that affect the SCAP planning process.

B. Semi-Annual Planning Process

Beginning in mid-January and July, Regions should generate SCAP reports for internal review of the planning data in CERCLIS and CERHELP. These planning data should reflect any adjustments or approved amendments made to the annual plan. Regions should note that changes made in CERCLIS to site schedules and other planning data will not automatically result in changes to SCAP and SPMS targets. Although Regions have the flexibility to alter plans, they are still accountable for meeting the targets negotiated at the beginning of the fiscal year.

On the second Mondays of February and August, Headquarters extracts the proposed Regional SCAP update. The Regional reports are circulated to Headquarters program offices for review, and serve as the basis of Headquarters/Regional negotiations. To ensure consistency in the negotiation phase, the CERCLIS and CERHELP databases are frozen prior to generating the Regional reports. Using CERCLIS, Headquarters will transmit a copy of the reports to the Regions at the same time they are extracted at Headquarters. As a result, all parties (Headquarters and the Regions) will have identical data for use during the negotiation process. Exhibit XVII-3 summarizes the major activities of the February and August negotiating sessions.

CERCLIS data quality problems that affect the SCAP update are to be resolved prior to negotiations. The problems should be resolved on a Region-specific basis through conference telephone calls between Headquarters and the IMC. The IMC will communicate with the appropriate RPM or Section Chief as necessary to resolve data integrity problems.

C. SCAP/SPMS Adjustment/Amendments

After targets have been finalized and planned funding levels developed, the SCAP process provides the flexibility to modify plans during the year. Modifications to planned targets are termed either adjustments or amendments. Amendments are SCAP changes that:

- Decrease an annual SCAP target
- Increase the Region's annual operating budget
- Change the Advice of Allowance
- Change a quarterly or annual SPMS target.

The SCAP amendment process requires a formal request from the Regional Division Director to Headquarters. The SPMS amendment process necessitates a formal

Exhibit XVII-3

SCAP Planning Year

SECOND QUARTER
(February)

- Update planning information in CERCLIS for the third and fourth quarter current year
- Review slippage in current year targets for development of action strategies
- Negotiate preliminary SCAP/SPMS targets and measures for planned year with HQ and Regions
- Determine preliminary planned year FTE allocations based on the preliminary targets and measures
- Identify major projects requiring funding in the outyear
- Provide complete site schedules including planned obligations to allow HQ to project the outyear budget.

FOURTH QUARTER
(August)

- Finalize resources for planned year
- Establish final SCAP/SPMS commitments for planned year
- Set operating year annual Regional budget

request from the Regional Administrator. Any other SCAP change is an adjustment and does not require Headquarters' approval. An example of a SCAP adjustment is substituting one site for another that was originally planned for a specific SCAP or SPMS target. Adjustments are incorporated in CERCLIS by updating the database and the CERHELP Targets and Accomplishments data file on an ongoing basis. Exhibit XVII-4 sets forth the SCAP amendment process.

All amendments should be recorded in the CERCLIS site-specific database after the Region issues the change request or memorandum to OSWER. Regions should not initiate any obligation against change requests until confirmation is received from the Office of the Comptroller. Regions cannot revise the site back-up in the Targets and Accomplishments data file until the amendment is approved by Headquarters.

D. *SPMS Target Adjustments*

Regions may request an adjustment to a SPMS target if the change is necessitated by extenuating circumstances. Changes in SPMS targets may be necessary and approved under the following conditions:

- Major, unforeseen contingencies arise that alter established priorities (i.e., Congressional action)
- Major contingencies arise to alter established Regional commitments (i.e., State legislative action)
- Measure or definition in system is creating an unanticipated negative impact.

SPMS target adjustments must be submitted in writing to the Assistant Administrator, OSWER (AA, OSWER). The AA, OSWER evaluates the request and makes a recommendation to OMSE whether to concur with the request.

E. *Planning Requirements and Procedures*

The SCAP Manual (OSWER Directive 9-200.3-01B) contains detailed information on planning requirements and procedures for the various Superfund response and enforcement program activities. RPMs should refer to the manual for specific requirements and procedures of the SCAP planning process. The SCAP manual sets forth specific planning requirements and procedures for:

- Preliminary Assessments/Screening Site Inspections
- Listing Site Inspections
- Operable Units in Remedial and Enforcement Programs
- First and Subsequent Starts and Completions
- To Be Determined (TBD) Sites
- Setting Activity Time Frames
- Project Takeovers

- Determining Impact on Funding Status of RP Takeover
- Site Classification
- State Enforcement
- Technical Assistance Grants.

RPMs play an integral role in communicating site status information to the IMC. This information must be timely to ensure accurate planning for future activities. RPMs should make themselves thoroughly familiar with the planning requirements and procedures set forth in the SCAP manual.

F. *Accomplishment Reporting* CERCLIS is the Regional reporting vehicle for SCAP and SPMS. If an activity or event is not properly entered into CERCLIS, the event will not have occurred for budget or accountability purposes. It is therefore crucial that information be entered into CERCLIS promptly and accurately. Accomplishments data are recorded on CERCLIS Site Information Forms (SIF) and CERHELP Non-Site Incident Activity Maintenance Forms, or other Regional data entry forms and are entered into CERCLIS and CERHELP by the IMC or designee. Data on accomplishments should be entered into CERCLIS within five days of the event. Therefore, it is important that RPMs promptly relay relevant site information to the IMC through their Section Chief.

G. *SPMS* Regions enter accomplishments data into CERCLIS. Quarterly, Headquarters extracts accomplishments data from CERCLIS and manually enters the information into the PR1ME-based SPMS system. The data are then forwarded to the Regions, where they are checked for discrepancies. The Regions review the accomplishments identified by Headquarters and identify any discrepancies. The Regions then correct the data in CERCLIS if necessary and enter comments regarding discrepancies. Headquarters and the Regions then reconcile the discrepancies and Headquarters enters final information into the SPMS system.

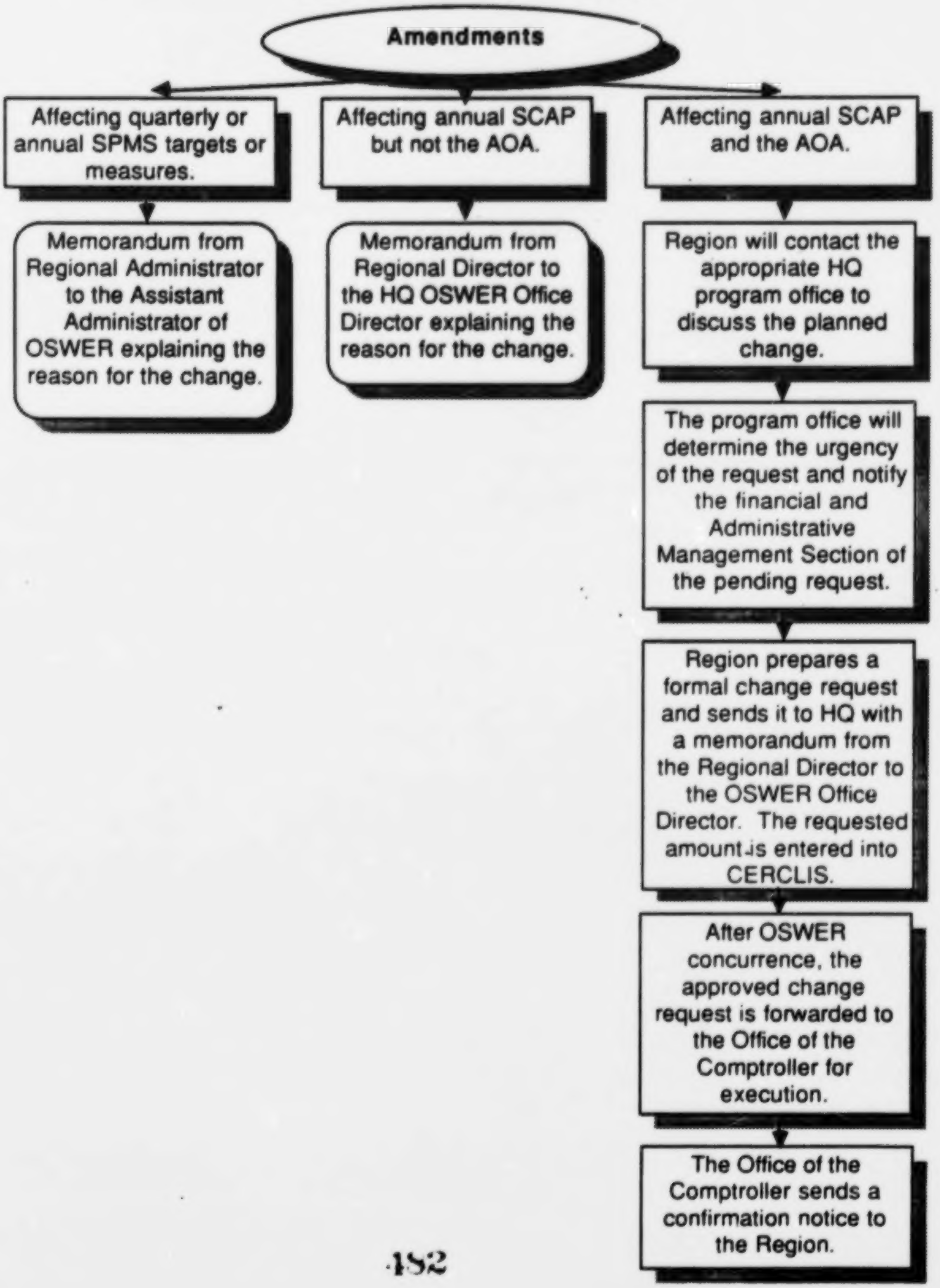
H. *SCAP* Regions should generate SCAP reports beginning on the first day of each quarter for internal review. Regions perform data quality checks and make adjustments to the CERCLIS or CERHELP database if the databases do not reflect actual accomplishments. The RPM must verify that CERCLIS and CERHELP data are consistent with actual accomplishments.

On the second Monday of each quarter, Headquarters extracts SCAP reports from CERCLIS and CERHELP. These reports are reviewed by Headquarters to evaluate Regional progress toward SCAP targets, and accomplishments data are submitted to OMSE for reporting SPMS accomplishments.

I. *Financial Planning and Management* The SCAP process is the planning mechanism used by the Superfund program to identify remedial, removal, and enforcement funding needs for the current and planned fiscal years. The planned obligations included in the fourth quarter SCAP update in CERCLIS (August) form the basis of the final Regional budgets for the next fiscal year. The

Exhibit XVII-4

SCAP Amendment Process



Amendments

Affecting quarterly or annual SPMS targets or measures.

Memorandum from Regional Administrator to the Assistant Administrator of OSWER explaining the reason for the change.

Affecting annual SCAP but not the AOA.

Memorandum from Regional Director to the HQ OSWER Office Director explaining the reason for the change.

Affecting annual SCAP and the AOA.

Region will contact the appropriate HQ program office to discuss the planned change.

The program office will determine the urgency of the request and notify the financial and Administrative Management Section of the pending request.

Region prepares a formal change request and sends it to HQ with a memorandum from the Regional Director to the OSWER Office Director. The requested amount is entered into CERCLIS.

After OSWER concurrence, the approved change request is forwarded to the Office of the Comptroller for execution.

The Office of the Comptroller sends a confirmation notice to the Region.

annual Regional operating plan and the associated budget are a result of the Headquarters and Regional negotiations on the proposed program budgets. Regions are required to operate within their final negotiated annual operating budget.

Prior to the fiscal year, each Region is allocated an annual budget for pre-remedial, remedial, removal, and enforcement activities. The criteria used to develop the major portion of the Regional budget are discussed in the SCAP manual.

J. *Case Budget*

Case budget funds are apportioned to the Regions based on the annual targets and measures and the Region's planning information reflected in the CERCLIS and CERHELP site and non-site databases. Each activity has a pricing factor that is used during the allocation process. These factors are itemized in Exhibit XVII-5. Activities with a duration of less than one year are fully funded (e.g., PRP search, negotiations, removal oversight, long-term response, Section 107 administrative). Activities with a duration exceeding one year are funded quarterly (e.g., RI/FS, oversight, Section 106 and 107 litigation). Other priority activities (Administrative Record, Federal facility NPL listing support, State management assistance, and Preliminary Natural Resource Surveys) are added to this calculation. Allocations are reviewed and adjusted quarterly based on changing targets and the number of quarters remaining in the current fiscal year. The case budget is discussed in detail in Chapter XVI, Case Budget/Contracts.

K. *Advice of Allowance*

The Advice of Allowance (AOA) represents the funds allocated to each Region by the Office of the Comptroller for each quarter of the fiscal year. The AOA comprises five accounts:

- Remedial Action (site-specific)
- Remedial Design (non-site-specific)
- Removal (non-site-specific)
- Other Remedial (regular or "O" Allowance)
- Enforcement (case budget).

The Enforcement, or case budget, account is managed by OWPE. The other accounts are managed by OERR.

AOA Process

The Office of the Comptroller issues the quarterly AOA on the first working day of each quarter. The AOA is based on the Phase III Operating Plan that identifies projected obligations for each quarter of the fiscal year. The Phase III Operating Plan for FY 89 is based on the final SCAP plans developed in the fourth quarter of FY 88. Funds available for obligations, however, are limited to projected needs for the upcoming quarter. OWPE has a specific process for the Enforcement AOA, which is discussed in Chapter XVI, Case Budget/Contracts.

AOA Change Request Procedures

Regions are required to manage the funds issued in the AOA. Headquarters approval is not required to shift funds between projects within the other remedial, RD, removal or enforcement portions of the AOA. Any shifts of funds between allowances or any addition or deletion of funds from any of the allowances requires Headquarters approval through the SCAP amendment and change request procedures. These procedures are discussed in detail in the SCAP Manual.

Exhibit XVII-5(1)

FY90 Case Budget Funded Activities Required to Achieve Program Outputs

TECHNICAL ENFORCEMENT SUPPORT WORKLOAD MODEL CATEGORIES	ASSOCIATED CASE BUDGET FUNDED ACTIVITIES (Target =*)	CERCLIS CODES	CERHELP CODES	VALID LEADS	$K AVG. PRICING FACTOR		AVG. DURATION IN QUARTERS	TOTAL AVG. COST
					ANNUAL	QRTRLY		
REMOVAL PROGRAM	- NON- NPL RP Search	RP	RP	FE	2.2		1	2.2
	- Removal Negotiation Starts	RN	RN	FE				
	- RP Oversight (PRP removals)*	RV, IR, PR		RP, MR	50.0		1	50.0
PRE RI/FS (Enforcement Activity)	- NPL RP Search	NS	PS	FE	50.0		2	50.0
	- RI/FS Negotiation Starts	FN	FN	FE	50.0			50.0
PRP RI/FS OVERSIGHT	- RP RI/FS Oversight (Starts*, Ongoing through Completion*)	RI, FS, CO	RI	RP, MR		20.0	10	200.0
RD/RA COMPLIANCE MONITORING	- RA Oversight	RA	RA	RP, MR		2.5	6	15.0
	- RD Oversight	RD	RD	RP, MR		2.5	4	10.0
LITIGATION SUPPORT	- Administrative Cost Recovery	AV		FE	12.0		1	12.0
	- RD/RA Negotiation Starts*	AN	AN	FE	30.0		3	30.0
	- NBARS	NB	NB	FE				
	- Referrals*						1	20.0
	Section 106, 106/107	SX, CL	SX, CL	FE			1	14.0
	Section 107 Removal	SV	SV	FE	20.0		1	20.0
	Section 107 Remedial	SV	SV	FE	14.0			
	- Ongoing Support				20.0			
	Section 106, 106/107	SX, CL	SX, CL	FE		20.0	14	280.0
	Section 107	SV	SV	FE		7.8	14	109.2

Exhibit XVII-5(2)

FY90 Case Budget Funded Activities Required to Achieve Program Outputs

TECHNICAL ENFORCEMENT SUPPORT WORKLOAD MODEL CATEGORIES	ASSOCIATED CASE BUDGET FUNDED ACTIVITIES	CERCLIS CODES	CERHELP CODES	VALID LEADS	PRICING FACTOR		AVERAGE DURATION IN QUARTERS	AVG. TOTAL COST
					ANNUAL	QRTRLY		
STATE ENFORCEMENT	- PS Lead RI/FS Oversight*	RI, FS, CO	RI	PS		15.0	10	150.0
FEDERAL FACILITIES	- IAG Negotiations*	IN		FE	50.0		2	200.0
	- RI/FS Oversight*							120.0
	1st Operable Unit	RI, FS, CO	RI	FF		20.0	10	80.0
	2nd Operable Unit	RI, FS, CO	RI	FF		12.0	10	
	3rd + Operable Unit	RI, FS, CO	RI	FF		8.0	10	200.0
	- RD/RA Oversight*							120.0
	1st Operable Unit	RD, RA	RD, RA	FF		20.0	10	80.0
	2nd Operable Unit	RD, RA	RD, RA	FF		12.0	10	
	3rd + Operable Unit	RD, RA	RD, RA	FF		8.0	10	
PROGRAM IMPLEMENTATION	- TES V+ Program Management		PM					
	- Administrative Record	AR	AR	*RP, RE				
	- Records Management		RM					
	- Federal Facility Docket		RD	FF				
	- Community Relations	CR, RC	CR	RP, RS, SE				
	- State Enforcement Management Assistance		EM	PS				
	- Information Management		IM					
	- ERA Oversight	ER		RP				
	- Management Assistance	MA	MA	RP				
	- Preliminary Natural Resource Surveys		PN	RP				
	- Technical Assistance	TA	TA	PS, RP				

* Activities may be planned either site-specifically or non-site specifically.

IV. POTENTIAL PROBLEMS/RESOLUTIONS

A. ***Data Quality and Planning in CERCLIS***

RPMs play a central role in ensuring CERCLIS data accuracy. Inaccurate or missing data may lead to insufficient funding and incorrect accomplishments reporting. RPMs must communicate all relevant site information through their Section Chief to the IMC in a timely manner to ensure CERCLIS data integrity. RPMs also should review relevant CERCLIS data regularly for consistency with actual activity.

B. ***Headquarters/Regional Negotiations***

The SCAP negotiation process involves extensive and detailed communication between Headquarters and the Regions. During this process, it is important that RPMs coordinate closely with the IMC and other appropriate personnel so that the most current and accurate information is considered during the negotiation.

C. ***Interpretation of Definitions***

It is essential that Headquarters and Regional personnel clearly understand the SCAP and SPMS targets and measures definitions. Incorrect interpretations of target and measure definitions may prevent actual accomplishments from being reported or recognized. RPMs must communicate with their Section Chief or the IMC regarding the nature of reported activity to ensure that the appropriate targets and measures are updated.

D. ***Impact of Schedule Changes on SCAP***

Site schedule changes must be analyzed for their impact on SCAP, and the changes entered into the system as soon as possible. SCAP will continue to be a viable planning tool only if accurate planning information is entered into the system. RPMs must inform the IMC promptly of site schedule changes to ensure the effectiveness of the SCAP planning functions.

V. REFERENCES

Manual	OSWER Directive 9200.3-01B, Superfund Comprehensive Accomplishments Plan (SCAP) Manual (updated annually).
Contacts	Office of Waste Programs Enforcement, CERCLA Enforcement Division, Compliance Branch, Regional Planning Section. FTS 382-4845. Office of Waste Programs Enforcement, Program Management and Support Staff, Information Management Section. FTS 475-8113. Office of Emergency and Remedial Response, Office of Program Management, Resources Management, Budget and Forecasting Section. FTS 475-9367.
Training	"CERCLIS Enforcement Overview," a 1-day course and "Customized CERCLIS Reporting," a 2-day course are periodically available. For additional information, call FTS 475-6127.

INDEX

Administrative Order (AO): II-9, 11, 14; IV-17, 27; V-2, Ex. V-1, 10, 11, 13, Ex. V-4, 14, 15, 17, 18, 19, 21, 22, 24, 25; Ex. VI-2, Ex. VI-3, 20; VII-3, 9, 10; IX-2; Ex. XV-1(2), Ex. XV-3(2).

Administrative Order on Consent (AOC)/Consent Order: I-2, 4; Ex. II-1, Ex. II-4, II-10, 11, 12, 13; Ex. V-1, 10, 16; VIII-1; XIII-5; XIV-2.

Administrative Order, Unilateral (AOU)/UAO/Unilateral Order: Ex. II-1, Ex. II-4, 8, 10, 11, 13, 14; IV-2; V-17; VIII-2, 25; XIII-5.

Administrative Record (For Selection of Remedy): Ex. II-1, Ex. II-2, Ex. II-4, 4, 12; VI-21, 27, 29, 30, 31, 32, App. A-1; VII-2, 7, 8, 9, Ex. VII-2, 10, 14, 17, 20; XIII-9; XV-1, 2, 4-9, 12.
(For Deletion - Deletion Docket): XI-5, 6-8, 9, Ex. XI-1; XV-1.

Administrative Subpoena: IV-5, 19-20.

Advice of Allowance: XVI-3-4, 9; XVII-3, 9-10, Ex. VII-4.

ARARs: I-3; IV-1, 13; V-9, 16; Ex. VI-1, 3, 5, Ex. VI-3, 15, 16, 24, 25, 29, 31, App. A-1, App. A-4; VI-1, 3, 7, 14; Ex. XV-3.

ATSDR: VI-4, 7, 12, 23, 27, 28, 29, App. A-1, App. A-4, App. A-5; XI-8; Ex. XV-3(2).

Case Budget: V-18, 19; VI-19; XII-26, 27; XIII-12; Ex. XIV-1, 12, 13, Ex. XIV-2; **Ch. XVI**; XVII-9.

CERCLA Settlement Policy: VIII-13.

CERCLIS: II-17, 18, 19; III-10; Ex. IV-4, 25; V-19, Ex. V-5; VI-6, 18; VII-15, Ex. VII-3, 21; VIII-16, 26, 27; IX-5, 6; X-3; XI-1, 10; XII-10, 26-27; XIV-11-12, Ex. XIV-1; XVI-1, 2, Ex. XVI-1, 8; XVII-1, 2-3, 6-7, Ex. XVII-4, 8, 11.

Civil Investigator(CI): II-6, 20; IV-2, 7-8, 10, 18, 19, 24.

Close-Out Report: XI-2-5, Ex. XI-1, Ex. XI-2, 13; XII-10.

Community Relations: II-15, 16; VI-5, 6, Ex. VI-2, 18, App. A-1 through 5; VII-8-9, 17, 20; **Ch. XIII**; XV-1.

Community Relations Coordinator: VI-6, 9; XI-8; XV-4; **Ch. XIII**.

Community Relations Plan: Ex. II-2, 16; VI-9, 23, App. A-1; VII-5, 10, 16; Ex. XV-2, Ex. XV-3.

Consent Decree: I-2, 4; V-16, 19, 21, 22; VIII-1, 2, 8, 29; Ex. IX-1, Ex. IX-3, 2, 9-10; X-2; XIV-2; Ex. XV-1, Ex. XV-3.
    Reopeners: VIII-9, 21.
    Covenants not to Sue: VIII-8.

Contracts (TES, ARCS, ERCS, etc.): V-18; VI-7, 19; Ex. VII-3; IX-8; XII-17; XIII-12; Ex. XV-1, 12; **Ch. XVI**.

Contractors: II-6, 15, 17; IV-2, 8-9, 10, 18, 26; V-8, 18; VI-24, 29; VII-16; IX-1, Ex. IX-2, Ex. IX-3; Ex. XV-1, 4.

Cooperative Agreement: VII-2; XIV-1, 2, 4, 7, 12, Ex. XIV-2; Ex XV-1, Ex. XV-3; XVI-8.

Cost Recovery: I-1; II-15; IV-2; VIII-10; **Ch. XII.**

Case Referral: XII-3.

Documentation: XII-12-19; XV-9-10.

De Minimis Settlements: I-2; V-2; VIII-1, 19-21, 29; XII-21, 22, XIII-8.

Department of Interior (DOI): V-8; VI-4, 7.

Department of Justice (DOJ): I-6, 7; III-3; IV-17; V-2, 3, 15, 17, 19; VII-16; VIII-2, 4, 24, 25; XI-8; XII-2, 3, 24; XIII-5, 7, 8.

Emergency Response Notification System (ERNS): II-18, 19, Ex. II-7.

Endangerment Assessment: VI-12-13; 24-25.

Risk Assessment: VI-2, Ex. VI-1, 6, Ex. VI-3, 12-13, 24-25.

General Notice Letter (GNL): IV-2, 21-23; V-6, 24.

Good Faith Offer (GFO): V-1, Ex. V-1, 13, 14-15, 24; VIII-11.

Hazard Ranking System (HRS): not in III, IV, VI

Information Request Letter (104(e)Letters): IV-5, 7, 8, 10, 11, 12-16, 17, 19, 20, 23; V-1, 6; XII-7, 19.

Inter-Agency Agreement (IAG): IX-8; Ex. XV-1; XVI-8.

Liability: I-2; Ex. II-4, 20; IV-2-4, 6; XII-5, 7.

Land Disposal Restrictions (Land Ban): Ch. VII Appendix B

Long Term Response Action (LTRA): X-1; XI-1, 3-4, Ex. XI-1.

Mixed Funding: I-2; V-2; VIII-1, 15-16; XII-23.

Cash Out: VIII-15, 18-19.

Mixed Work: VIII-15, 18.

Preauthorization: VIII-15, 16-18.

Natural Resource Trustees: I-7, V-8, 19; VI-4, 7, 9, 10, VIII-2, 9.

NBAR: I-2; V-2; VIII-13, 22-23.

NCP

  Proposed: II-2; VII-2; XI-5; XIII-5, 6.

  Current (1985): II-1, 2; VI-3, 26; VII-2, 17; XI-5.

Negotiation Moratorium: II-11; V-13, 15; VII-10; VIII-12.

NPL: IV-1, 24, 25; V-6; Ex. VI-1, 18; Ex. VII-1; XI-1, 5, 11; XIV-5, 8, 10.

NPL Deletion: **Ch. XI**; XIV-14.

Office of Emergency and Remedial Response (OERR) Roles and Responsibilities: I-6; V-8, 18; VIII-17; XI-3; XV-1; XVI-1; XVII-1.

Office of Enforcement and Compliance Monitoring (OECM) Roles and Responsibilities: I-6; III-3; V-2, 3; VIII-4, 24.

Office of General Counsel (OGC) Roles and Responsibilities: VIII-23.

Office of Regional Counsel (ORC) Roles and Responsibilities: I-6; IV-2, 4, 7-8, 18, 19; V-2, Ex. V-2, 7, Ex. V-4; VI-6, 20; VII-16; VIII-3, 10; IX-2, 8; X-4, 8; XII-24; XIII-3; XV-8, 13.

Office of Waste Programs Enforcement (OWPE) Roles and Responsibilities: I-6; III-3, 4; V-2, 7, 18, 19; VI-18; VIII-3, 17, 24; XI-3, 13; XVII-1.

On-Scene Coordinator (OSC) Roles and Responsibilities: II-3, 6, 7, 9, 10, 14, 15, 16, 17, 19; XI-4; XII-1; XIII-3; XV-8.

Operation and Maintenance (O&M): **Ch. X**; XI-2.

  O&M Plan: X-2.

Oversight: I-1, 5; Ex. II-1; XIV-14; (see RI/FS Oversight and RD/RA Oversight).

Oversight Assistant: VI-6-7, 11-12, 23.

Proposed Plan: VI-5, 6, 16; VII-1, 4, 5, 6-8, 9, 12-13; VIII-2, 3, 10, 11; XIII-6.

PRP Search: I-4; Ex. II-1, II-2, 3, 6, 7, Ex. II-3, Ex. II-4, 20; **Ch. IV**; V-1, Ex. V-1; VIII-6, 30; XII-7-8.

  PRP Search Plan: II-6, 7, Ex. II-3, 17; Ex. IV-1; Ex. V-1.

  Baseline Report: Ex. IV-1, Ex. IV-2, 18.

  Interim Final Report: Ex. IV-1, Ex. IV-2, 20.

QAPP/FSP: XV-2, Ex. XV-1, 3.

RD/RA Negotiations: I-4, V-21; VI-32, VII-10; **Ch. VIII**; XII-2-3; XIV-4.

    RD/RA Negotiation Plan: II-6, 7; VII-1, 6, App.

RD/RA Oversight: I-5; IX-1, Ex. IX-2, Ex. IX-3, 8; XIV-2-3.

Records Management: **Ch. XV**.

Record of Decision (ROD): V-11, 21; VI-1, Ex. VI-1, 4, 5, 6, 18; Ex. VII-1, 4, 5, 8, 9, 10-14, 15, Ex. VII-3, 16, 17; Ex. IX-1-3; Ex. XI-4; Ex. XIII-1, 6, 7; XIV-8; Ex. XV-3.

Regional Project Officer: (RPO) XVI-4, 5, 11.

Removals: **Ch. II.**

Risk Assessment: V-16, 21-22; VI-1, 5, 6, Ex. VI-3, 12-13, 24, 29, App. A-2; VII-2.

    Endangerment Assessment: VI-29; VII-3.

RI/FS Negotiations: I-4; **Ch. V**; VI-1, 4, 8; XIV-4.

    RI/FS Negotiation Plan: III-5; Ex. V-1, 6.

RI/FS Oversight: I-5; Ex. V-3; VI-3, Ex. VI-2; VI-4, 5, 6, Ex. VI-2, Ex. VI-3, 11-12, 27, 29, App. A-1 through 5; XIV-2-3.

Selection of Remedy: VI-14, 16, 17; **Ch. VII**; VIII-7.

Settlement Decision Committee (SDC): VIII-3, 23.

Site Completion: **Ch. XI**.

Site Management Plan: III-1, 3, 9.

Site Planning: **Ch. III**.

Special Notice Letter (SNL): V-1, 13, 14, 19, 24; Ex. VI-2; VII-10; VIII-2, 9, 10; XII-11; Ex. XV-1.

Statement of Work (SOW): V-2, Ex. V-1, 9-10, Ex. V-3, 14, 16, 18, 24; VI-2, 3, 8, 10; VII-3, 8, 10; X-2; XVI-4, 10.

State Enforcement: I-7; VII-2, 8, 14, 23, 27, 28; Ex. IX-3, X-1; **Ch. XIV**; XV-5.

Strategic Planning & Management System (SPMS): II-17, 18, Ex. II-5, 10; Ex. IV-4, 24; V-4, 19, Ex. V-5; VI-18; VII-15, Ex. VII-3; VIII-27, 28; IX-5, Ex. IX-4, 9; XI-10; Ex. XIV-1; **Ch. XVII.**

Steering Committee: IV-2, 22; V-1, 2, 7, 8, 15; VIII-2, 7, 12, 29, 30.

Superfund Comprehensive Accomplishments Plan (SCAP): I-5; II-17, Ex. II-5; III-10; Ex. IV-4, IV-24, 27; V-4, 8, 17, 18, 19, Ex. V-5, 24; VI-18, 23; VII-15, Ex. VII-3; VIII-6, 27; IX-5, Ex. IX-4, 9; XI-10; XIII-11; XIV-10-11, Ex. XIV-1, 14; XVI-1, 3, 4, 8, 9; **Ch. XVII.**

Superfund Enforcement Tracking System (SETS): V-19.

Superfund Memorandum of Agreement (SMOA): VII-2; XIV-1, 2, 4, 5,-7, 14; Ex. XV-1, Ex. XV-3.

Technical Assistance Grant: Ex. XIII-1.

Technical Assistance Committee: VI-8.

Technical Assistance Team (TAT): II-6, 7, Ex. II-3, 15, 17; XV-3.

Technical Enforcement Support (TES): II-6, 7, 15, 17, 18; VIII-26.

Work Assignment Manager: XVI-4-7, 10-11.